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NO. __________

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

WILLIE D. PHILLIPS, et al,

PETITIONERS,

v.

THE AMOCO OIL COMPANY, et al

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS

FOR THE

ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER PETITIONERS STATED VIABLE COMMON-LAW AND ERISA CLAIMS

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The opinion of the Eleventh Circuit Court of Appeals, Phillips v. Amoco Oil Company, 799 F.2d 1464 (11th Cir. 1986), appears in the Appendix. The opinion of the district court, Phillips v. Amoco Oil Company, 619 F. Supp. 694 (N.D. Ala. 1985), also appears in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 22nd day of September, 1986. A timely petition for rehearing was filed on the 14th day of October, 1986, and was denied on the 28th day of October, 1986. This

Court's jurisdiction is invoked under the Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The Employee Retirement Income Security Act of September 2, 1974, 29 U.S.C. § 1001, et seq.

STATEMENT OF THE CASE

Willie D. Phillips, Horace T. Lovell, J. P. Fennell, William H. Jones, Frank Murphree, Billy R. Pinyan, Lewis O. Moore, and Mildred Gaynell McClendon, individually and on behalf of others

similarly situated, filed suit on September 26, 1980, against Standard Oil Company and Respondents, Amoco Oil Company (hereinafter "Amoco"), Joe D. Bearden (hereinafter "Bearden"), and Northern Propane Gas Company (hereinafter "Norgas") and demanded a jury trial. (R. 1-1-10). Thereafter, H. Glenn Gardner, Homer Weaver, Owen J. Sims, Agnes Copeland, James H. Owens, Elah M. Gurley, Larry U. Davis, Walter Shaneyfelt, and R. C. Shrader joined in the complaint previously filed. (All petitioners shall hereinafter be collectively referred to as "the Employees").

The complaint contained class averments as well as six counts. Count

One alleged Amoco breached an agreement with the Employees by terminating the Employees for no just cause from their employment and by further depriving the employees of certain retirement benefits as well as other benefits. Count Two alleged Amoco, through its agents, servants, and/or employees made fraudulent misrepresentations concerning the Employees' employment with Amoco. Count Three alleged Amoco, Norgas, and Bearden occupied a fiduciary relationship with regard to the Employees and that Amoco, Norgas, and Bearden had superior knowledge regarding the Employees' length of employment, pension and retirement benefits, and the comprehensive employment benefit program

available to the Employees. This Count further that Amoco, Norgas, and Bearden suppressed material facts which they were under an obligation to communicate to the Employees, thereby practicing a fraud upon the Employees. Count Five alleged Amoco, Norgas, and Bearden were guilty of misrepresentation and willful deceit pursuant to Alabama Code §§ 6-5-101,-102,-103, and 104 (Ala. Code 1975). Count Six alleged Amoco, Norgas, and Bearden were guilty of conspiring to misrepresent and suppress material facts regarding the Employees' length of employment, employment benefits, retirement benefits, and pension benefits, thereby depriving the

Employees of their rightful employment benefits. (R. 1-1-30-39).

Amoco, Norgas, and Bearden filed a petition to remove the case to the United States District Court for the Northern District of Alabama, Southern Division, on October 27, 1980. (R. 1-1-1) The basis of this petition was that the Employees' claims were governed by the Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. (R. 1-1-18) Bearden filed a motion to dismiss, or in the alternative, a motion for a more definite statement on October 27, 1980. (R. 1-3-1). A similar motion was filed on behalf of Norgas on October 27, 1980, (R. 1-4-1), which was granted on December 4, 1981. (R. 1-12-1)

Standard Oil Company filed a motion to dismiss on October 27, 1980, on the ground that the court lacked jurisdiction over it. This motion was granted on January 7, 1981. (R. 1-2-1) A motion to remand was filed on behalf of the Employees on November 6, 1980. On December 17, 1980, the Employees supplemented their original motion to remand by attaching an affidavit of five of the Employees which stated that the individual defendant and respondent herein, Bearden, was guilty of misrepresenting the Employees' job security and benefits. The affidavit further stated that Bearden was guilty of misrepresenting to the Employees that Amoco would never sell the liquid propane

gas facility made the basis of their lawsuit and the facility at which the Employees were employed. The motion to remand was denied on January 8, 1981. (R. 1-6; R. 1-8-1)

The Employees amended their complaint on December 19, 1980, by adding Count Seven which alleged that Amoco represented to the Employees, individually and collectively, that all pension, retirement, and profit sharing benefits with Amoco would be protected, vested, and would be in full force and effect until the Employees reached retirement age. The Employees further alleged that Amoco, through its agents, and employees, represented that it would not, under any circumstances, sell the

facility at which the Employees were employed unless a sale was made which would fully protect Employee benefit rights existing under the Employees' employment with Amoco. (R. 1-9-1) The complaint was amended again on April 26, 1982, to add Counts Eight through Seventeen. Count Sixteen of the amended complaint alleged that Amoco interfered with the rights of the Employees to receive the benefits which existed under the contract of employment between the Employees and Amoco. (R. 1-14-11-17)

The Employees amended their complaint again on June 25, 1982, to add that the defendants had violated 29 U.S.C. § 1104(a)(1); 29 U.S.C. § 1104(a)(1)(B); 29 U.S.C. §

1106(b)(2); 29 U.S.C. § 1110(a); and 29 U.S.C. § 1343(a)(b). (R. 1-19-1-31) A motion to dismiss filed on behalf of Amoco on July 7, 1982, was overruled. (R. 1-20-1) A pre-trial order was entered by the court on October 24, 1984. (R. 2-28-1) On November 5, 1984, Norgas filed a motion for summary judgment. (R. 2-29-1) In support thereof, Norgas offered the depositions of the Employees, the pre-trial order, all pleadings on file, and the affidavits of Ronald Ingram and John Churchill. (R. 2-30-1 and R. 2-31-1) Amoco and Bearden filed motions for summary judgment on November 8, 1984. (R. 2-33-1) In support thereof, Amoco and Bearden offered deposition excerpts, the

affidavits of Larry J. Boyd, John Churchill, Ronald E. Ingram, C. E. Webb, and William C. Jackson. (A 222-364) On January 28, 1985, the Employees objected to the affidavits submitted in support of the motions for summary judgment by filing a motion to strike on the grounds, inter alia, that the affidavits were based on hearsay and drew conclusions which invaded the province of the jury. (R. 2-37-1) This motion to strike was overruled on June 18, 1985, and on the same date, the trial court granted summary judgment in favor of Amoco, Norgas, and Bearden. A memorandum opinion accompanied the order of judgment. (R. 2-38-1)

A motion to reconsider, or to vacate, and for recusal was filed on June 28, 1985. (R. 2-40-1) One basis of this motion was that the author of the memorandum opinion supporting the judgment entered in the case was the law clerk for the trial judge and this clerk had accepted a job with the law firm representing Norgas during the pendency of the litigation. Disclosure of this employment had not been made to counsel for the Employees. (R. 2-40-1) The motion further alleged that the court was incorrect in holding that Amoco, Norgas, and Bearden were entitled to judgment as a matter of law with respect to the ERISA claims, in holding that the fraud claims were barred by the statute of

limitations, in holding that the common law claims were preempted by ERISA, and in holding that there was no genuine issue of material fact with regard to the claims for breach of lifetime employment contracts. (R. 2-40-2-3) Norgas objected to the motion based primarily on the argument that the Employees had waived any objection to participation of the law clerk in the case. (R. 2-41-2) The law clerk himself filed an affidavit in support of the contentions of Norgas. (R. 2-42-1) The motions for reconsideration and recusal were overruled on September 9, 1985, (R. 2-40-1), with a separate memorandum opinion entered on the same date. (R. 2-43-1) Notice of appeal was timely

filed on September 27, 1985. (R. 2-44-1) The Eleventh Circuit affirmed the trial court on September 22, 1986. A timely motion for reconsideration was filed on October 14, 1986. This was overruled on Ocotber 28, 1986.

Amoco's predecessor in name, American Oil Company, merged with an entity known as Tulcma, Inc., in 1968. Five of the Employees were previously employed by companies acquired by Amoco or Tuloma and eleven of the Employees were employed by Amoco as new employees. (R. 2-28-4)

Amoco began looking for a means to dispose of its liquid propane gas facilities prior to May 4, 1979. On May 4, 1979, Norgas submitted an offer to

purchase Amoco's LPG operations in the southeastern United States contingent upon approval by the board of directors of the parent company of Norgas. By letter dated May 10, 1979, Amoco accepted the offer of Norgas. The two companies then exchanged information and negotiated a final agreement. On July 31, 1979, the final sales contract was signed. A meeting was held in Boaz, Alabama, in August 1979 ostensibly to explain the sale of the LPG facilities to the Amoco LPG Employees. The testimony of the Employees taken in this action shows the confusion present at the meeting and also substantiates the argument that the meeting did little to clarify the terms of the sale insofar as the Employees were

concerned. The sale was closed effective 12:01 September 4, 1979. Employment with Norgas was begun on September 4, 1979. After the sale of the LPG operation to Norgas, the Employees had the same job responsibilities he or she had with Amoco and were compensated at the same rate of pay. (R. 2-28-8) The Employees had been eligible to participate in the Employee Retirement Plan of Standard Oil Company and participating companies as employees of Amoco. Standard Oil Company was the administrator and named fiduciary of the Employee Retirement Plan of Standard Oil Company. Each of the Employees who was vested under the Employee Retirement Plan of Standard Oil Company is currently receiving an annuity

from the plan. The Employees' years of service with Amoco were recognized by Norgas for purposes of vacation time but years of service with Amoco for early retirement purposes were not credited by Norgas.

REASONS WHY THE WRIT SHOULD BE ISSUED

THE EMPLOYEES STATED COMMON-LAW CLAIMS THAT WERE NOT PREEMPTED BY ERISA. ADDITIONALLY, THE EMPLOYEES STATED VIABLE CLAIMS UNDER ERISA. ERISA DOES NOT PREEMPT COMMON-LAW CAUSES OF ACTION WHEN THE ADJUDICATION OF THOSE CLAIMS DOES NOT REGULATE A PENSION PLAN.

This Court in *Franchise Tax Board v. Construction Laborers'*

Vacations Trust for Southern California, 463 U.S. 1, 77 L.Ed. 2d 420 (1983), faced a decision as to whether ERISA permitted state tax authorities to collect unpaid state income taxes by levying on funds held in trust for taxpayers under an ERISA-covered vacation benefit plan. The procedural issue before this Court, and the only issue that was decided by this Court, was whether a federal court has jurisdiction to decide the above-stated substantive issue after the lawsuit has been removed from state court. This Court held that the case was not within the removal jurisdiction conferred by 28 U.S.C. § 1441 and, therefore, did not reach the merits of the previously mentioned question.

Franchise Tax Board, 77 L.Ed. 2d at 429. This Court did cite the legislative history of ERISA and noted that although ERISA defines who may bring actions for particular kinds of relief, ERISA does not purport to reach every question relating to potential plaintiffs covered by the statute. Further, the court noted that 29 U.S.C. § 1441(b)(2)(A) "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans." Franchise Tax Board, 77 L.Ed. 2d at 440-41. While Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504 (1981), states that ERISA does preempt state causes of action which purport to "regulate, directly or indirectly, the

terms and conditions of employment benefit plans covered by the chapter," 451 U.S. at 525, a common-law cause of action which does not purport to directly "regulate" a pension plan should be allowed to proceed.

Allowing common-law claims such as the ones stated by the Employees in the instant case to proceed is in accord with the holdings of this Court with regard to preemption and other areas of federal law. The Court in Belknap, Inc. v. Hale, 463 U.S. 491, (1983), was faced with the issue of the scope of the preemption of the National Labor Relations Act. The Court set forth the rules that are used in deciding whether the National Labor Relation Act preempts state causes of

action. First, the Court stated that state regulations and causes of actions are presumptively preempted if they concern conduct that is arguably either prohibited or protected by the National Labor Relations Act. 463 U.S. at 498. For this proposition, the Court cited San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Second, state regulation of a cause of action may, nonetheless, be sustained if the behavior to be regulated is behavior of only peripheral concern to federal law or touches interests deeply rooted in local feeling and responsibility. 463 U.S. at 498. Stated differently, the state's interest in controlling or remedying the effects of the conduct is

considered in balancing the state's interest with the Labor Board's ability to adjudicate controversy committed to it by the Labor Relations Act. 463 U.S. at 498-99.

Dealing with the facts presented in the Belknap case, the Court noted that Kentucky had a substantial interest in protecting its citizens from misrepresentations that caused grievous harm. The Court held, therefore, that the National Labor Relations Act did not preempt the misrepresentation and breach of contract claims against the employer. Likewise, in the instant decision, the fraud and conspiracy causes of action as well as that of breach of contract alleged by the Employees should not be

preempted by ERISA. The state has a strong interest in discouraging such behavior so as to protect its citizens from such fraudulent conduct and breaches of contract.

While the National Labor Relations Act may not contain expressed preemption provisions, this Court has nonetheless held state regulations and causes of actions are preempted by the National Labor Relations Act if those regulations or causes of actions concern conduct that is actually or arguably either prohibited or protected by the National Labor Relations Act. 463 U.S. at 498 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959)). As noted by the court in Metropolitan

Life Insurance Company v. Massachusetts, ____ U.S. _____, 85 L.Ed. 2d, 728 (1985), the analysis used in determining whether a state law is preempted under ERISA or the National Labor Relations Act is the same since, "[t]the purpose of Congress is the ultimate touchstone." 85 L.Ed. 2d at 740 (citing Malone v. White Motor Corporation, 435 U.S. 497, 504 (1978)). The narrow issue in the Metropolitan Life case, according to the Court, was whether a Massachusetts law requiring minimum mental-health-care benefits be provided to Massachusetts residents covered under an employee health plan was a law which "regulated insurance" pursuant to 29 U.S.C. § 514(b)(2)(A). This section specifically

deals with the issue of preemption in the insurance field. Since the court in Metropolitan Life noted it was dealing with a narrow issue and addressed a statute concerning preemption with regard to the insurance field and employee benefit plans, that case should not be read so broadly as to set a precedent for preemption of every conceivable cause of action under state law that merely touches on an employee benefit plan but does not seek to regulate or control that plan.

The Seventh Circuit in Bucyrus-Erie Company v. Department of Industry, Labor, and Human Relations, 599 F.2d 205 (7th Cir. 1979), cert. denied, 444 U.S. 1031 (1980), held

Congress did not intend to preempt the enforcement of state fair employment laws. The mere fact that the plan involved in Bucyrus-Erie governing pregnancy leave was subject to federal regulations did not inevitably require the preemption of concurrent state legislation. The court in the Bucyrus-Erie case noted ERISA does not include any substantive provisions prohibiting an employer from maintaining discriminatory benefit plans. Therefore, the Seventh Circuit held there was no conflict and ultimately, no preemption. Bucyrus-Erie, 599 F.2d at 207. The court stated the initial question must be whether the Wisconsin fair-employee laws "related" to employee benefit plans. Bucyrus-Erie, 599 F.2d at 208. Using

this analysis, the Seventh Circuit held the preemption of state fair-employment laws would "alter" and probably impair the Congressional scheme for preventing employment discrimination. Bucyrus-Erie, 599 F. 2d at 210. Applying this same analysis to the case at bar reveals that holding that the Employees' common-law claims are preempted would allow employers such as Amoco to freely defraud employees by assuring them they have permanent employment while clandestinely operating to obtain the greatest monetary benefit for theemployer and concomitantly depriving the employee of an opportunity to obtain pension rights and to participate in negotiations of the sale

of a facility such as the one involved in this case.

To hold the fraud claims and breach of contract claims are preempted by ERISA would be to frustrate the very purpose of ERISA as well as other state laws which regulate the wrongful conduct set out in the Employees' complaint. Thus, the Employees respectfully contend that the state's interest in controlling or remedying the effects of the conduct complained of should be weighed against any alleged interference with the provisions of ERISA. Such a weighing clearly shows that the scales are tipped in favor of allowing the Employees to proceed with their common-law claims. To allow the Employees to proceed with their

common-law claims would not directly affect the pension plan but would deter similar conduct by employers in the future.

The Seventh Circuit in Savings and Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038 (7th Cir. 1983), noted there are necessary limits to the phrase "relates to" as found in 29 U.S.C. § 1144, ERISA'S preemption statute. The Gago opinion quoted from a footnote found in Shaw v. Delta Airlines, Incorporated, 463 U.S. 85 (1983), which recognized that some state action may affect employee benefit plans in too tenuous, too remote, or peripheral a manner to find that the state action is

preempted. Shaw, 463 U.S. 100 n. 21. While the interference with the attainment of benefits is part of the damage suffered by the Employees, the conduct complained of is fraud and breach of lifetime contracts of employment. Thus, the Employees respectfully contend the pension plan is only remotely affected by the pursuit of common-law claims by the Employees.

Amoco, Bearden, and Norgas have steadfastly maintained throughout these proceedings that not only are the common-law claims preempted but also that there is no cause of action for the alleged wrongful conduct under ERISA. This argument creates an escape from liability for Amoco, Norgas, and Bearden.

By arguing that state causes of action are preempted on one hand and that there are no causes of action for the conduct complained of under ERISA, Amoco, Norgas, and Bearden actually support the argument that the common-law causes of action should not be preempted by seeking a result that was never intended by Congress.

The Eleventh Circuit erroneously held the common-law claims for fraud were barred by the one year statute of limitations in Alabama for fraud. Ala. Code § 6-2-39 (1975). The Employees' claim did not accrue until September 4, 1979. The complaint was timely filed on September 4, 1980. The law in Alabama is to the effect that the

statute of limitations for torts can begin to run only when an injury happens or damage accrues. Brotherhood of Locomotive Firemen and Enginemen v. Hammett, 273 Ala. 397, 401, 140 So. 2d 832 (1962); Corona Coal Company v. Hendon, 213 Ala. 323, 325, 104 So. 799 (1925). The cause of action in this case accrued on the date the Employees were forced to leave their employment with Amoco. Prior to that date, the Employees had suffered no injury for which they could complain.

The defendant in the Hammett decision alleged, as have Amoco and Bearden, that the plainitffs' cause of action was barred by the applicable statute of limitations. In Hammett the

defendant asserted that the wrongful conduct occurred in July 1955. The complaint, however, was not filed until March 21, 1957. The critical factor in Hammett as in the instant case, was the fact the plaintiff had not been taken off the payroll of his employer until June 1, 1956. The Alabama Supreme Court held in this action for wrongful and malicious interference with the plaintiff's right to earn a living that the statute of limitations began to run only when the injury happened or damage accrued, not from the date of the act causing the injury or damage. As the plaintiff had suffered no damage until he lost his job on June 1, 1956, the plaintiff in the Hammett decision had one year from June

1, 1956 to maintain his action to recover for damage resulting from the loss of employment. The court held the defendant's contention with respect to the statute of limitations was without merit. Hammett, 273 Ala. at 41. The contention of Amoco and Bearden in the instant case with regard to the statute of limitations is equally without merit.

The fraudulent conduct caused no injury to the Employees as long as they were employed by Amoco. Once, however, the Employees were no longer employed by Amoco, they suffered an injury. The Employees no longer had the employment with Amoco which they had been told they would have until they retired. The law in Alabama is that until a plaintiff

suffers an injury he has no right to bring an action, and the statute of limitations does not begin to run until an injury occurs.

In Ramey v. Guyton, 394 So. 2d 2 (Ala. 1931), decided under Alabama's statute of limitations for medical malpractice, the plaintiff filed suit against her physician because of a stroke suffered approximately one year after the doctor prescribed birth control pills. The plaintiff first saw the defendant doctor in August 1970 and last saw him on August 27, 1975. On the last visit, the physician prescribed the suspect birth control pills, and the plaintiff took the pills as prescribed until August 5, 1976, when she suffered a stroke. The lawsuit

was filed on August 1, 1978. The trial court granted summary judgment in favor of the defendant doctor based upon the statute of limitations. This judgment, however, was reversed by the supreme court. The defendant contended that August 27, 1975, the date of the plaintiff's last visit with the doctor and the date the prescription was given was the date that the cause of action accrued. The supreme court held, however, that the cause of action accrued on the day the plaintiff suffered the stroke.

The one year statute of limitations for torts begins to run when the plaintiff suffers an injury which in turn gives rise to a cause of action. The

fraudulent acts of Amoco, Bearden, and Norgas in this case did not cause an injury contemporaneous with the fraudulent acts. The injury occurred no earlier than September 4, 1979, because on September 4, 1979, the Employees were actually deprived of what they had been promised.

Even assuming the statute did begin to run earlier than September 4, 1979, the testimony with regard to what the Employees were told at the Boaz meeting concerning the benefits that the Employees would have with Norgas is in conflict. Willie Phillips described the meeting in Boaz in August 1979 as "the wildest thing I ever got in on." (Phillips depo. at 63) Phillips went on

to say, "Didn't nobody know nothin' about nothin', I don't reckon." (Phillips depo. at 73) He further testified, "But we didn't know nothin' what we were signing." The meeting began at approximately 7:00 p.m. and ended somewhere between 12:30 and 1:00 a.m., and the plaintiffs had to go to work the next day. (Frank Murphree depo. at 52; Mildred McClendon depo. at 38)

At least one Employee testified that as a result of the Boaz meeting, she thought that Amoco was merely undergoing another name change. (E. Gurley depo. at 30) She stated she did not realize that her years of service with Amoco would not be credited toward her employment with Norgas until October 1979. (Gurley depo.

at 40) Mildred McClendon testified that she did not realize that her years of service with Amoco would not be credited by Norgas until possibly one month after the Boaz meeting. (McClendon depo. at 58) Larry Davis stated that he could not remember when he realized that his years of service with Amoco would not be carried over and applied to his employment with Norgas, but that it was after Norgas had purchased Amoco's LPG facilities. (L. Davis depo. at 42) James Owens testified he realized his years of service with Amoco would not be credited by Norgas <u>after</u> he went to work for Norgas. (J. Owens depo. at 57)

Billy Ray Pinyan stated, "There was just so many papers until you didn't have

time to really read to see what you were signing." (B. Pinyan depo. at 53) Lewis O. Moore testified that he thought the purpose of the Boaz meeting was to announce another name change. The first time he learned that his years of service would not be credited by Norgas was when he received his paycheck from Norgas. (L. Moore depo. at 38) He also testified he had a conversation with Ray Coile, an agent or employee of Amoco, in July or August 1979 at which time Mr. Coile stated that Mr. Moore would not lose any time with regard to his benefits. (L. Moore depo. at 62) It was Mr. Moore's understanding that his years of service with Amoco would be credited under the

Norgas retirement plan. (L. Moore depo. at 82)

Willie Phillips testified that Bearden told him everything would be the same after Amoco sold its LPG facilities to Norgas. (W. Phillips depo. at 64-65) Robert Shrader testified that he was told at the Boaz meeting that he would be "better off with Norgas than [he was] with Amoco and that the persons in charge of the Boaz meeting told the Amoco employees that, "Northern Propane was going to be our new owners. And that they . . ., I thought, were going to give us the same or better than what we had. That is, . . . I was under the impression . . . they were telling us that we were going to be better off with Northern than

we were with Amoco." (R. Shrader depo. at 48) Owen Sims describes the Boaz meeting as "so much [taking] place so fast that night we don't really know what all took place." James Owens testified that the benefits were not explained at the Boaz meeting. (J. Owens depo. at 57)

A letter from Norgas, Exhibit 0764 to the deposition of Appellant Horace T. Lovell, stated "Norgas has a comprehensive set of benefit programs quite comparable to the benefits you currently receive from Amoco." Owen Sims testified that he was told by higher-level employees of Amoco that Norgas was taking over all benefits Amoco had provided for its employees. (O. Sims depo. at 56) The above excerpts from the

depositions and this letter show there is a conflict in what was and what was not said at the Boaz meeting and in other conversations between the Amoco supervisors and the Employees. In light of this testimony, a fact question was created with regard to whether the Employees knew as of the Boaz meeting that they had been defrauded.

Amoco, Bearden, and Norgas argued before the trial court that the savings clause of § 6-2-3 (Ala. Code 1975) is applicable to the instant case. Employees contend that this savings clause is inapplicable as suit was filed within the one year period after Employees suffered injury. Even assuming § 6-2-3 is applicable, a conflict in

the evidence as to when the plaintiffs discovered the fraud created a material fact which precluded the entry of summary judgment. In Wilson v. Draper, 406 So. 2d 429 (Ala. Civ. App. 1981), the vendor of a piece of property brought suit based upon fraud against the purchaser of the property. The vendor, an illiterate man, had inherited sixty acres of property from his grandfather. In 1975 he sold the property to the defendant for $22,000.00. Evidence was introduced that the vendor had received a promissory note for only $11,800.00 in the spring of 1978. The plaintiff discovered at that time the defendant was only paying him $11,800.00 for the property instead of the agreed upon price

of $22,000.00. The defendant raised the statute of limitations as the defense, but in order to show that he was within the savings period of the statute of limitations, the plaintiff presented evidence that he did not know that the sales price differed from the amount he agreed upon until May 1978. The court stated, "This testimony, while it does not clearly establish when the plaintiff first discovered the fraud, does indicate that the plaintiff was unaware of the fraud until the passage of considerable time after the deed was signed." 406 So. 2d at 431.

The Alabama Supreme Court in Weninegar v. S. S. Steele & Company, Inc., 477 So. 2d 949 (Ala.

1985), adopted the ruling of the Supreme Court of Alaska in Austin v. Fulton Insurance Company, 444 P. 2d 536 (Alaska 1968), in which the court stated as follows: "A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. . . . [T]here must be an injury or harm to [plaintiff] as a consequence of [defendants'] negligence to serve as a basis for recovery of damages before the tort [becomes] actionable and before the period of limitation [commences] to run." 477 So. 2d at 956 (quoting Austin, 444 P. 2d at 539). The Alabama court stated that it believed this to be the proper rule and overruled an earlier decision,

Moore v. United States Pipe & Foundry Company, 384 So. 2d 1108 (Ala. Civ. App. 1980), to the extent that it conflicted with its holding.

Both the Weninegar and Hammett decisions support the position of the Employees herein that the statute of limitations for their claims of fraud did not begin until their employment with Amoco was terminated on September 4, 1979, at which time the Employees had suffered the injury or harm necessary to form a basis for recovery of damages. Prior to September 4, 1979, the Employees had suffered no damages for which a complaint could have been filed. The Employees did state causes of action under ERISA necessary to withstand the

motions for summary judgment. The Employees allege that Amoco, Norgas, and Bearden were guilty of violation of 29 U.S.C. § 1140. Section 1140 provides a comprehensive prohibition forbidding discrimination against plaintiff participants or beneficiaries for the purpose of interfering with the attainment of any right to which the participant may become entitled under the plan. The Employees asserted Amoco and Norgas were guilty of discriminating against them for the purpose of interfering with their attainment of rights under the plan. The trial court interpreted the Employees' position with regard to § 1140 as being that § 1140 was intended to prohibit the sale of

businesses. (R. 2-38-45) This was not, and is not, the position of the Employees. Rather, the Employees have alleged that Amoco deliberately followed a plan for avoiding pension liability as a means of increasing profits, not that it deliberately increased its profits by means that happened to affect the Employees' eligibility for pension benefits.

The plaintiff in Calhoun v. Falstaff Brewing Corporation, 478 F. Supp. 357 (E.D. Mo. 1979), alleged the defendants had discharged the plaintiff from employment after more than nine years of satisfactory service for no reason other than to prevent him from attaining vested rights due him under the

pension plan provided by the defendants. The court held that summary judgment in favor of the defendants was improper in this situation as this conduct was the type conduct intended to be prohibited by § 1140. In fact, the court noted that practices of this sort may have been one of the prime targets of ERISA. 478 F. Supp. at 359-60. The court also noted that whether the plaintiff's rights under the plan were vested within the meaning of ERISA at the time of his discharge would be irrelevant to a cause of action based on § 1140. 478 F. Supp. at 360.

The Employees alleged in the instant complaint that Amoco followed a plan for avoiding pension liability as a means of increasing its profitability. Deposition

testimony revealed that keeping the Employees "in place," until the sale of the LPG facilities had been completed,made the sale more profitable to Amoco. Further testimony indicated Amoco took into consideration the monies that had to be expended to fund the plan in making the decision to divest itself of the LPG facilities. The sale was more lucrative to Norgas as well because Norgas received the benefit of experienced route salesmen with well-established contracts. (G. Richmond depo. at 49-51) At the same time, Norgas was able to avoid the financial obligations of crediting past years of service of the Employees with Amoco for vesting purposes.

The language of § 1140 is extremely broad as it prohibits discrimination against a participant for the purpose of interference with the attainment of <u>any</u> right to which the participant <u>may become entitled</u>. The Second Circuit has stated that "ERISA is thus a remedial statute, the coverage of which should be liberally construed, and exemptions from which should be confined to a narrow purpose." <u>Rose v. Long Island R. R. Pension Plan</u>, 690 F.2d 49, 54 (2nd Cir. 1982).

The district court in <u>Kross v. Western Electric Company, Inc.</u>, 701 F. 2d 1238 (7th Cir. 1983), granted summary judgment in favor of the defendant employer in an ERISA case in which the plaintiff had alleged the defendant had

discharged the plaintiff to prevent him from continuing to participate in a company-provided insurance plan. The Seventh Circuit reversed the district court's order and held that since ERISA is a remedial statute it is to be liberally construed in favor of the employee benefit fund participants. The court further noted that the plaintiff's allegations stated a claim under § 1140 since such allegations, if proven, might establish that the plaintiff employee was discharged for the purpose of interfering with the attainment of a right under the insurance plans provided by the employer. Kross, 701 F.2d at 1242-43.

Section 1140 creates a federal cause of action against what might be described

as "pension discrimination," or action that is deliberately designed to prevent participants or beneficiaries from ever attaining eligibility for pension or welfare plan benefits to which they otherwise might become entitled. The guarantee of § 1140 is crucial to the entire framework of ERISA. Without it, parties would be free to nullify other ERISA guarantees by operating in such a manner that an individual beneficiary never attains eligibility for benefits under an otherwise lawful plan. Section 1140 affords the individual this protection independent of any rights covered under a benefit plan or agreement. Once an employer undertakes to provide a

benefit plan, then he must adhere to these standards.

The mandate of § 1140 is absolute: an employer shall not discriminate in such a manner as to interfere with the attainment of plan rights. The statute does not allow employers to discriminate when doing so would spare the employer the obligation of providing full pension benefits. The statute does not provide that employers who face hostile markets may take such self-help measures as terminating employees to prevent their gaining eligibility for pension benefits. The statute does not permit a "business necessity" defense for avoiding pension liability. An employer always benefits financially by terminating an employee

prior to the approval of his pension rights. If the benefit plan has been fully funded, the employer reaps the benefits of the funds accumulated which, due to the interference with the attainment of pension rights, are no longer needed to provide the benefits. If the employer has not funded a plan, then the employer avoids the liability he would have incurred had he not manipulated the employee's service and prevented accrual. In any event, discrimination, whether in the form of complete termination or of a transfer to another employer, prevents the attainment of benefits and saves the employer money. The amount depends totally upon the scope of the discrimination. If saving money

immunized this discriminatory conduct, the violation of § 1140 would contain its own defense. Section 1140 is not soillusory, its plain purpose is to forestall employers from giving in to the otherwise natural inclination to save money through manipulating benefit accrual.

Section 1140 reflects both legislative intent and purpose. It prohibits discrimination against employees to prevent them from attaining rights under a plan. ERISA outlaws such conduct because, absent these prohibitions, the financial rewards of discrimination are too tempting. ERISA does not, however, preclude an employer's consideration of the cost of a pension

plan. ERISA does not require that an employer offer a pension plan at all. Aside from minimal vesting and participation standards, ERISA does notdefine the types of benefits a plan must provide. It does not require that plans be periodically amended to increase benefits or to provide new types of benefits. On each of these points, ERISA permits an employer to consider cost and determine whether a plan or particular benefit program is too expensive. ERISA merely carves out a number of areas in which consideration of costs cannot motivate decisions. Once an employer provides a plan to his employees, ERISA regulates his ability to weigh costs. Section 1140 precludes an employer's

management of pension costs through dismissal of employees or placing employees with other employers before the employee qualifies for promised benefits.

The Employees have never taken the position that an employer can never close a business. The Employees do, however contend that § 1140 requires a neutral decision when decisions such as the ones in the instant case are made. Section 1140 does not immunize employees from the effects of a bona fide business decision undertaken for reasons totally unrelated to the accrual of benefits. The conduct of the employer, however, must not be motivated by discriminatory intent. This is the conduct which is prohibited by § 1140 and thus, one of the reasons why

summary judgment was inappropriate in the instant case. Rarely are questions of intent and motive proper for summary judgment. <u>Sahadi v. Continental Illinois National Bank & Trust Company</u>, 706 F.2d 193, 196-197 (7th Cir. 1983); <u>Ness v. Marshall</u>, 660 F. 2d 517, 519 (3d Cir. 1981).

Both counsel for Amoco and the trial court relied heavily upon the case of <u>Sutton v. Weirton Steel Division of National Steel Corporation</u>, 724 F.2d 406 (4th Cir. 9183), <u>cert. denied,</u> 466 U.S. 1301, (1984). This suit dealt with the propriety of the terms of the sale of a business. The distinguishing factor in this case is that the suit dealt with the terms of a <u>proposed</u> sale. The employees

in _Weirton_ had at all times participated in the proposed sale as noted in the district court opinion, _Sutton v. Weirton Steel Division of National Steel Corporation_, 567 F. Supp. 1184, 1191-92 (N.D.W. Va. 1983). Additionally, all parties had agreed that the announcement by National Steel that it would no longer invest in the Weirton Division which was the subject of the sale, was not a ploy to coerce workers into giving labor costs concessions. One of the acts complained of by the Employees in the instant case is that the proposed sale of the LPG facilities by Amoco to Norgas was concealed from the Employees until such time that the Employees were deprived of a meaningful opportunity to negotiate

with any of the prospective purchasers for benefits or to demand that Amoco fulfill its fiduciary obligations.

Additionally, the opinion of the Fourth Circuit in Weirton is distinguishable from the instant case as § 1140 of ERISA was not even addressed. This opinion focused on the duty of a union with regard to fair representation in thesale of a division of the employer. The terms of the proposed sale of the business differ from the instant case in that the years of service for an employee in Weirton, who had worked for both the predecessor and successor corporations,would have years of service for both aggregated with each employer funding a pro rata share of the benefits.

Neither the district court nor the circuit court in Weirton were faced with the situation in which the plaintiffs alleged the predecessor employer was attempting to increase its profits by deliberately avoiding pension plan liability and in which years of service with the predecessor employer were completely lost.

CONCLUSION

Petitioners, the Employees herein, respectfully request that this Court grant the petition for writ of certiorari to the Circuit Court of Appeals for the

Eleventh Circuit. As grounds therefor, petitioners state that the holding of the Eleventh in the instant case is inconsistent with the Eleventh Circuit with regard to the interpretation of 29 U.S.C. § 1140, that the holding of the Eleventh Circuit was inconsistent with the holding of the Seventh Circuit with regard to the preemption question, and that the holding of the Eleventh Circuit was erroneous with regard to the statute of limitations on the common-law claim for fraud.

J. Gusty Yearout

J. GUSTY YEAROUT

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition has been served upon counsel for all parties in this cause by mailing a copy of same to their office addresses by regular U.S. Mail, postage prepaid and properly addressed this the 26 day of January, 1987, as follows:

Mr. William B. Hairston, Jr.
Attorney at Law
4th Floor, 109 No. 20th Street
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Mr. Stephen E. Brown
Attorney at Law
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Birmingham, AL 35203

Mr. Charles Bruce
Attorney at Law
1313 Merchants Bank Building
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I further certify that in accordance with Rule 28.2, this Petition was deposited in a U. S. Post Office box with first-class postage prepaid and properly addressed to the Clerk of the Supreme Court within the time allowed for filing, to-wit: January 26, 1987.

J. Gusty Yearout
J. GUSTY YEAROUT

SWORN TO and SUBSCRIBED before me this 26

day of January, 1987.

Becky G. Davis
NOTARY PUBLIC
My Commission Expires November 17, 1989

(P)

86-1397

NO. __________

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

WILLIE D. PHILLIPS, et al,

PETITIONERS,

v.

THE AMOCO OIL COMPANY, et al

RESPONDENTS.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES

COURT OF APPEALS

FOR THE

ELEVENTH CIRCUIT

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*Counsel of Record

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WILLIE D. PHILLIPS, et al.,
Plaintiffs,

vs.

AMOCO OIL COMPANY, a
corporation, et al.,
Defendants.

Civil Action No. CV80-L-1416-S

United States District Court For The
Northern District of Alabama,
Southern Division

June 18, 1985

This is an action seeking the recovery of specified employee benefits, together with compensatory and punitive damages. It stems from the sale of a liquid propane gas operation by defendant Amoco Oil Company ("Amoco") to defendant Northern Propane Gas Company ("Norgas"). The plaintiffs have cast their net wide,

alleging that the sale violated no less than eight sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et. seq. Moreover, in apparent recognition of the fact that such a wide net is bound to develop a few holes, the plaintiffs have tacked on certain state law claims as well. The jurisdiction of the Court is invoked under 29 U.S.C. § 1132, and the doctrine of pendent jurisdiction.[1]

After numerous pleading amendments and our years of extensive discovery, the legal sufficiency of these claims may now be tested. Both Amoco[2] and Norgas may have moved for summary judgment based upon the pleadings, affidavits, depositions, stipulations and other

documents now on file.[3] Upon careful review of the record as it now stands, the Court is convinced that all defendants are entitled to judgment as a matter of law on each and every claim asserted by the plaintiffs.

BACKGROUND

The following facts are undisputed. In the years before 1979, Amoco operated a business, in Alabama and elsewhere in the southeastern United States, which sold liquid propane gas ("LPG"). Each of the plaintiffs in this action was an employee of Amoco working in the LPG operation in Alabama. As employees of Amoco, the plaintiffs were eligible to participate in the employee Retirement Plan of Standard Oil Company and

Participating Companies (hereinafter referred to as "the Standard Plan" or "the Amoco Plan"). Prior to May, 1979, Amoco began to seek a purchaser for its Southeastern LPG operations. On May 4, 1979, defendant Norgas submitted an offer to purchase Amoco's LPG facilities in the southeastern United States, contingent upon approval of the Board of Directors of its parent company. In that offer, Norgas specifically noted that retirement benefits for LPG employees who became employees of Norgas would be based on their years of service with Norgas. In other words, Norgas' initial offer to purchase the Amoco operations contemplated that, although years of service with Amoco would be recognized by

Norgas for certain employee benefit purposes, those prior years of service would not be recognized for benefit accrual purposes under the Norgas retirement plan.

By a letter dated May 10, 1979, Amoco accepted Norgas' offer. Amoco and Norgas then exchanged information and negotiated the definitive agreement. The parties signed the final sale contract on July 31, 1979. Section 2.5 of the sale contract provided in part:

> Buyer [Norgas] agrees to offer employment to each regular full-time employee of Seller [Amoco] presently assigned to the business represented by the various assets subject to this Contract, except employees on long-term and/or permanent disability...upon

> the following conditions: current salary and appropriate salary administration plan will be recognized; ... retirement benefits under the Buyer's Retirement Income Protection Plan will be based on years with Buyer except that continuous years of service with Seller immediately prior to the transfer date shall be credited by Buyer for vesting purposes....

The sale of Amoco's LPG operations to Norgas was closed effective 12:01 A.M. on September 4, 1979. The former Amoco employees, including plaintiffs, began their employment with Norgas on that date. Immediately after the sale of Amoco's LPG operations to Norgas, each plaintiff had the same job responsibilities and was compensated at the same rate of pay as he had enjoyed at Amoco. Exactly one year

later, on September 4, 1980, this action ensued.

In this action, plaintiffs have spun a tangled web of arguable related and intertwined claims, portions of which are intended to trap Amoco alone, and other portions of which are intended to ensnare both Amoco and Norgas.[4] The substance of these claims ranges from the honestly debatable to the utterly amorphous. The plaintiffs' failure to filter out the latter has rendered this litigation far more burdensome and unwieldly for the parties and the Court than it might otherwise have been.

First, the plaintiffs allege a number of state law claims. Thus, plaintiffs claim that at various times Amoco made

misrepresentations regarding plaintiffs' future job security, the security of their employee benefits, and the existence of plans by Amoco to divest itself of the LPG operation, thereby inducing plaintiffs to remain "in place" so as to enhance the value of Amoco's LPG operation as a salable "going concern." (Pretrial Order at 10-11). Moreover, plaintiffs allege that they had contracts for lifetime employment with Amoco, which Amoco breached when it sold the going LPG operation to Norgas and terminated plaintiffs' association with Amoco.

Finally, plaintiffs claim that Amoco and Norgas conspired to misrepresent certain facts regarding the Amoco-Norgas sale--specifically, the fact that

plaintiffs' years of service with Amoco would not be credited by Norgas for purposes of calculating retirement benefits under the Norgas retirement plan. (Pretrial Order at 12).

Plaintiffs contend that the terms of the Amoco-Norgas sale and the manner in which it was negotiated an effectuated violated at least eight sections of ERISA: 29 U.S.C. § 1022, § 1024, § 1056, § 1060, § 1104, § 1106, § 1140, and § 1141.

In the face of these allegations, the defendants contend that based upon an extensive record developed through four years of ample discovery, defendants are entitled to judgment as a matter of law with respect to each of the plaintiffs'

claims. For the reasons set forth below, the Court must agree with the defendants.

DISCUSSION

I. The State Law Claims

A. Lifetime Employment Contract

The Court will first address the state law claims, which may be disposed of without reaching the merits. The first of these claims concerns an alleged "lifetime employment contract" between plaintiffs and Amoco. Amoco has fervently denied entering into any lifetime employment contracts with the plaintiffs. However, assuming for purposes of this motion that such contracts existed, it is apparent as a

matter of law that they were not breached on the undisputed facts of this case.

Although lifetime employment contracts are relatively rare in industry today, they do exist and they have been recognized by several states to be valid and binding. Generally, of course, the typical employment contracts which contain no fixed period of employment are construed as terminable at will by either party. See Peacock v. Virginia-Carolina Chemical Co., 221 Ala. 680, 130 411 (1930). Under certain circumstances, however, employment contracts which purport to be terminable only at the will of the employee will be held to create a valid and binding contract of "permanent" or "lifetime" employment in favor of the

employee. See Alabama Mills, Inc. v. Smith, 237 Ala. 296, 186 So. 699 (1939). Nevertheless, Alabama law on this question follows that of most other states which recognize lifetime employment contracts, and holds that there are certain limitations implied by law with regard to such contracts. Specifically, even where a lifetime employment contract is legally enforceable, the law implies the condition that the contract lasts only so long as the employer remains in the business for which the employee was hired and needs the particular services the employee was hired to perform. Alabama Mills, 186 So. at 701, 702. Accord, Bates v. Jim Walter Resources, Inc., 418

So. 2d 903, 906 (Ala. 1982); United Security Life Ins. Co. v. Gregory, 281 Ala. 264, 201 So. 2d 853, 854-55 (1967); Jordan v. Mallard Exploration, Inc., 423 So. 2d 896, 898-99 (Ala. App. 1982).

In the present case, it is undisputed that Amoco sold its retail LPG business to Norgas, and abandoned the retail LPG business in Alabama. Prior to the sale, the various plaintiffs had held positions as salesmen, sales office supervisors, and sales and service representatives in various retail sales branches of Amoco's LPG operations.[5] After the sale, it is uncontroverted on the record that Amoco no longer engaged in the retail sales of liquid propane, and no longer needed the services the

plaintiffs had been hired to perform.[6] This being so, the above-cited authorities make it clear as a matter of law that Amoco is entitled to summary judgment on the plaintiffs' claims for breach of lifetime employment contracts. Even assuming that such contracts were made, they were not breached, since they terminated as a matter of law when Amoco left the retail LPG business in Alabama. Cf. Jordan v. Mallard Exploration, Inc., 423 So. 2d at 897-99.

The plaintiffs attempt in vain to escape the burden of the long line of precedents mandating this result. First, the plaintiffs argue that Amoco still does some business in Alabama, and that even after leaving the business of retail

sales of liquid propane, Amoco was under a contractual duty to transfer the plaintiffs to some other type of work in some other division of Amoco's operations. Alabama Mills and its progeny are inapplicable, they argue, because in those cases the employer no longer had work of any kind for the terminated employees to perform.

The plaintiffs labor against the current. Under Alabama law, a lifetime employment contract lasts only so long as the employer remains in the particular business for which the particular employee was hired. Thus, in Alabama Mills, the court stated:

> A leading case upon [the] subject [of lifetime employment contracts] is Carnig v. Carr, 167 Mass. 544, 46 N.E. 117....It was said that what they meant by a permanent employment was so long as defendant was engaged in the same nature of business and needed the service of such an employee, and plaintiff was able and willing to do it satisfactorily and gave no cause for his discharge.
> . . .
> If [the employee] has purchased a contract by which his employer leaves the period of duration to him, it resembles the purchase of other sorts of option rights, subject to the limitation impiedly included THAT the employer shall continue in such business and need the things to be done, which the employee is to do. In other words, such employee must have a preference over others in doing that sort of work.

Alabama Mills, 186 So. at 701, 702

(emphasis supplied).

Thus, in order for the principle of Alabama Mills to apply, it is not necessary that the employer go out of business totally. Rather, it is sufficient that the employer is no longer engaged in the business for which the particular employee is hired, and thus no longer in need of the particular services the employee was hired to perform. This is further confirmed by the decision of the Alabama Supreme Court in Bates v. Jim Walter Resources, Inc., 418 So. 2d 903 (1982). There, the plaintiff alleged that he had entered into a contract of lifetime employment with the defendant. In reliance on this alleged contract, the plaintiff had resigned from another job. Before she reported for work with the

defendant, however, "economic conditions caused [the defendant] to institute an austerity program, which included a hiring freeze." 418 So. 2d at 904. Pursuant to this program, the plaintiff was terminated. In the plaintiff's subsequent suit for breach of a lifetime employment contract, the Alabama Supreme Court affirmed the trial court's grant of summary judgment based upon proof that the employer no longer needed the services for which the plaintiff had initially been hired,[7] even though the employer had not gone out of business altogether. After quoting Alabama Mills, the Court stated:

> Thus, according to the above definition, an implicit term of the employment contract was that the employee would remain employed only if the employer had need of the employee's services. The trial court correctly found that Bates was terminated because [the defendant] did not need Bates' services or the services of other new employees at that time. 418 So. 2d at 906.

In the instant case, then, it is legally immaterial that Amoco continued to engage in some types of business in Alabama following the sale of its LPG operations to Norgas. The salient point is whether Amoco continued to engage in the business for which the plaintiffs were hired and continued to need the services which plaintiffs were hired to perform. As to that point, there is no

dispute of material fact in the record. Following the Amoco-Norgas transaction, Amoco was no longer in the retail LPG business, and no longer needed the plaintiffs' services as LPG retail sales personnel.[8]

Similarly flawed are the plaintiffs' attempts to sidestep the plain import of Alabama Mills and its progeny by claiming that they were never told "that they would have a job with Amoco [only] until Amoco decided to sell its facilities." (Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment, p. 5). Under Alabama law, all lifetime contracts terminate as a matter of law when the employer ceases to engage in the business for which the employee is hired.

There is no requirement that the employee be notified of this possibility in advance or that the term be expressed in the contract itself[9] --rather, the term is <u>implied by law</u> into <u>every</u> contract of lifetime employment governed by Alabama law.

The plaintiffs have adduced no evidence tending to establish that Amoco continues to engage in the business for which they were hired, and no evidence that Amoco continues to need the services which plaintiffs were hired to perform. Thus, based on the record before the Court, it is clear that there exists no genuine issue of material fact with regard to the plaintiffs' claims for breach of lifetime employment contracts.

The Court concludes that defendants are entitled to judgment as a matter of law with respect to these claims.

B. <u>The Fraud Claims</u>

The plaintiffs next allege two discrete claims of fraud--one against Amoco alone and the other against both Amoco and Norgas. First, the plaintiffs allege fraud with respect to their continued employment by Amoco. In substance the plaintiffs contend that Amoco falsely represented that the LPG operation would not be sold, that plaintiffs' jobs and benefits were secure, and that benefits would only be lost if plaintiffs voluntarily terminated their employment with Amoco or if plaintiffs failed to properly perform

their jobs. (Pretrial Order at 10-12).[10] Second, plaintiffs allege that Amoco and Norgas conspired to defraud the plaintiffs by misrepresenting material facts concerning the terms of the Amoco-Norgas sale (Pretrial Order at 12). Specifically, plaintiffs claim that defendants conspired to misrepresent the fact that plaintiffs' years of service with Amoco would not be credited by Norgas in calculating plaintiffs' retirement benefits under the Norgas retirement plan. As will be demonstrated, both of these fraud claims are legally deficient.

1. Fraud Concerning Continued Employment with Amoco.

Turning first to the claim of fraud with respect to plaintiffs' continued employment with Amoco, it is apparent from the record that these claims are barred by the applicable statute of limitations. Fraud actions are governed by a one-year statute of limitations under the law of Alabama. Ala. Code (1975) § 6-2-39. See also Papastefan v. B & L Construction Co. of Mobile, 385 So. 2d 966 (Ala. 1980). However,

> [i]n actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year within which to prosecute his action.

Ala. Code (1975) § 6-2-3. In applying this "savings statute"

> [t]he 'fact constituting the fraud' is deemed to have been discovered when it ought to have been discovered; that is, at the time of the discovery of facts which would provoke inquiry by a person of ordinary prudence and which, if followed up, would have led to the discovery of the fraud.

Moore v. Merchants & Planters Bank, 434 So. 2d 751, 754 (Ala. 1983), quoting Papastefan v. B & L Construction Co., Inc., 385 So. 2d 966 (Ala. 1980). Accord, Pines v. Warnaco, Inc., 706 F.2d 1173 (11th Cir. 1983); Sexton v. Liberty National Life Ins. Co., 405 So. 2d 18, 21 (Ala. 1981); Seybold v. Magnolia Land Co., 376 So. 2d 1083, 1087 (Ala. 1979). In other words, the statute of

limitations for fraud and misrepresentation effectively begins to run when the plaintiff "has either actual knowledge of the violation or notice of facts which, in the exercise of due diligence, would have led to actual knowledge thereof." _Cf_. _First Federal Savings and Loan Ass'n of Miami v. Mortgage Corp. of the South_, 650 F.2d 1376, 1378 (5th Cir. Unit B 1981). _Accord_, _Willcutt v. Union Oil Co. of California_, 432 So. 2d 1217 (Ala. 1983); _Moulder v. Chambers_, 390 So. 2d 1044 (Ala. 1981); _Cities Service Oil Co. v. Griffin_, 357 So. 2d 333 (Ala. 1978); _Johnson v. Shenandoah Life Ins. Co._, 291 Ala. 389, 281 So. 2d 636 (1973); _State Security Life Ins. Co. v. Henson_, 288 Ala. 497,

262 So. 2d 745 (1972). See also Moss v. Davitt, 244 Ala. 513, 52 So. 2d 515 (1951). More specifically, where (as here) the alleged misrepresentations related to future actions or conduct of the defendant, the Alabama Supreme Court has held that the limitations period will be deemed to have commenced at the time "[w]hen Plaintiff first learned that Defendant did not intend to perform as represented." Retail, Wholesale and Department Store Employees Union, Local 453 v. McGriff, 398 So. 2d 249, 252 (Ala. 1981). Accord, Fuqua v. Barbe, 376 So. 2d 202, 203-04 (Ala. Civ. App. 1979) cert. denied 376 So. 2d 205 (Ala. 1979).[11]

In the case _sub judice_, Amoco's alleged representations that the LPG operations would not be sold, and that plaintiffs' jobs and benefits would not be lost or terminated, were clearly representations concerning future actions or conduct of the defendant. Since it is undisputed that all plaintiffs had actual knowledge that Amoco did not intend to perform as represented--no later than August 21, 1979,[12] the statute of limitations on these claims expired, at the latest, on August 21, 1980. _McGriff_, 398 So. 2d at 252. _Fuqua v. Barbe_, 376 So. 2d at 203-04. Since this lawsuit was not filed until September 4, 1980, these claims of fraud concerning job and benefit security with Amoco are clearly

time-barred under Ala. Code (1975) §§ 6-2-39 and 6-2-3.

Plaintiffs insist, however, that their causes of action for fraud relating to their continued employment with Amoco did not accrue until September 4, 1980, when the sale was officially closed and they ceased to be employed by Amoco. Although the plaintiffs did not allege that these representations induced them to accept employment with Amoco in the first place, they do assert that they relied on Amoco's representations concerning their continued employment by staying "in place" in their jobs. Even though they were aware of the Amoco-Norgas sale by August 21, 1979, the plaintiffs insist that they suffered no

legal injury as a result of their <u>previous</u> reliance on Amoco's misrepresentations until they were actually taken off the Amoco payroll.

It is generally true, as plaintiffs assert, that damage is an essential element of a fraud action. "In equity, as at law, with the exception of special cases in some jurisdictions, fraud will not be relieved against unless it is shown that injury resulted <u>or will result</u> to the complainants as a consequence of said fraud." <u>Smith v. Smith</u>, 94 So. 2d 863, 868 (Ala. 1957) (emphasis supplied). However, as <u>McGriff</u> and <u>Fuqua</u> make clear, where the fraud alleged involves representations of intended future action or conduct by the defendant, the statute

of limitations begins to run when the plaintiff first learns that the defendant does not intend to perform as represented, regardless of whether the plaintiff's injury has already resulted or whether it is only substantially certain to result at a specified time in the future. Thus, in McGriff, the plaintiff claimed that he was told by his plant manager and his union steward that he would receive a pension benefit at age 55 if he "stayed on the payroll" for 15 years and joined the union, and that in 1959 in reliance of those representations, he accepted employment with the defendant company and joined the defendant union. In 1970, plaintiff was injured during the course of his

employment. Thereafter, he was paid workmen's compensation benefits for approximately six years by his employer's workmen's compensation carrier, but remained on the payroll and received one annual vacation pay check for each of the years 1971 through 1975. In 1973, plaintiff learned that the employer had ceased making payments into the pension fund on his behalf in 1970. In 1978, the plaintiff sued the employer and the union for breach of contract and fraud. However, despite the obvious fact that McGriff would not have been eligible to receive pension benefits until sometime after 1975, the Supreme Court of Alabama held unequivocally that his cause of action for fraud accrued in 1973, when it

became clear that he would not be paid a pension in the future as promised:

> When Plaintiff first learned that Defendant did not intend to perform as represented, the statute began to run. Fugua (sic) v. Barbe, 376 So 2d 202 (Ala. Civ. App. 1979), cert. denied 376 So. 2d 205 (Ala. 1979). Consequently, appellee's cause of action first accrued when he received the letters above set forth, representing Appellant's position vis-a-vis Appellee's right to a pension. From that date, January 24, 1973, Plaintiff had one year within which to file his cause of action bottomed on allegations of fraud by Appellant's officers....Plaintiff's complaint, to which the fraud claim was added by amendment was filed in April 1978, far beyond the one year after discovery period allowed by § 6-2-3.

McGriff, 398 So. 2d at 252.

The same rule was stated in Fuqua v. Barbe. There, plaintiff alleged fraud as to a promise to repair defective construction. The plaintiff had given no consideration in exchange for this promise, and had not altered his position to his detriment. The court held that defendant was entitled to judgment notwithstanding the verdict, because plaintiff's fraud claim was untimely. The court stated:

> The fraud of defendant claimed by plaintiff is not the extent of an original defective performance in construction, but is the making of a commitment to repair such defects which he did not intend to perform. When plaintiff first learned that defendant did not intend to perform as represented, the statute began to run.

376 So.2d at 203-04 (footnote omitted; emphasis supplied).

These cases control as to the fraud allegations relating to continued employment of the plaintiffs by Amoco and the receipt of Amoco employee benefits. the alleged misrepresentations related to future performance by Amoco. Even if the representations were made as alleged by plaintiffs, all of the plaintiffs knew by August 21, 1979, that Amoco did not intend to live up to the representations. They knew then that Amoco had sold the LPG operation to Norgas, and they knew that they would be terminated by Amoco. Therefore, the statute of limitations on this fraud claim began to run no later than that date.[13] The present lawsuit was filed on September 4, 1980, and this

fraud claim is therefore untimely as a matter of law.

Even if the date of injury is the relevant date, however, the plaintiffs' claims are still barred. It must be remembered that the claim we are concerned with here is a fraud claim, not a breach of contract claim.[14] The damage which is essential to a fraud action is damage "proximately resulting from [plaintiff's] reliance." First Virginia Bankshares of Benson, 559 F.2d 1307, 1313 (5th Cir. 1977), cert. denied 435 U.S. 952 (1978)(emphasis supplied); Ellis v. Zuck, 409 F. Supp. 1151, 1157-59 (N.D. Ala. 1976), affirmed 546 F.2d 643 (5th Cir. 1977). In the case at hand, the only reliance alleged by plaintiffs is

that they remained "in place." (Pretrial Order at 11-12; Transcript of February 25, 1985 Hearing at 21). However, the plaintiffs have consistently failed to identify any damage they might have suffered which could fairly be said to have proximately resulted from this "act" of reliance. Certainly the loss of Amoco employment and benefits did not result from their staying "in place." Indeed, if the plaintiffs had not stayed "in place," they would still have lost their Amoco benefits and their status as Amoco employees. Therefore, even if the plaintiffs are correct - that even where the fraud alleged concerns assurances of future action by the defendant, the statute of limitations does not begin to

run until the plaintiff suffers damage as a proximate result of his reliance on the misrepresentations-their claims are barred. The loss of their jobs did not proximately result from plaintiffs' reliance on the defendant's period. To the extent that staying "in place" did constitute damage or result in damage of some other kind to the plaintiffs-for instance, the deprivation of an opportunity to negotiate the terms of the sale or to seek other employment[15] - that damage must have occurred prior to August 21, 1979, when the plaintiffs learned of the sale. After that time, the plaintiffs could not have acted or failed to act in justifiable reliance upon any representations by Amoco

concerning the security of their jobs and benefits or the existence of plans to sell the LPG operation. It seems, then, that the plaintiffs are posed a conundrum of sorts. Either the fraud allegedly perpetrated upon them did not proximately result in damage to them at all, in which case their claims fail for lack of an essential element, or the plaintiffs suffered damage prior to August 21, 1979, and their claims are time-barred.[16]

Thus, even assuming that plaintiffs suffered some damage as a proximate result of their reliance upon the alleged misrepresentations concerning future employment with Amoco, the Court concludes that Amoco is entitled to judgment as a matter of law with respect

to this fraud claim based upon the statute of limitations.

2. Fraud Concerning the Terms of the Amoco-Norgas Sale.

With regard to the common law claims for fraud and conspiracy to defraud made against both Amoco and Norgas, the plaintiffs allege that Amoco "did fraudulently misrepresent ... that years of service would be accumulated toward retirement, [and] that retirement benefits and the right to early retirement would be protected." (Pretrial Order at 10). Plaintiffs also allege that Amoco and Norgas conspired to misrepresent material facts about the terms of the Amoco-Norgas sale in order to "deceive the employees about the fact

that years of service for retirement and pension purposes would not transfer to Norgas." (Amended Complaint of June 25, 1982, at par. 6; see also Pretrial Order at 12). In other words, the thrust of these claims is that Amoco and Norgas misrepresented of failed to disclose[17] the true terms of the Norgas benefit plan and the plaintiffs' rights under that plan.

Viewed in this light, it becomes plain that no recovery may be had upon these state law fraud claims unless the right to such recovery arises under ERISA. Section 514 of ERISA, 29 U.S.C. § 1144(a), preempts all state laws that "relate to" any employee benefit plan:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede <u>any and all</u> state laws insofar as they may now or hereafter <u>relate to</u> any employee benefit plan described in § 1003(a) of this title and not exempt under § 1003(b) of this title.

29 U.S.C. § 1144(a) (emphasis supplied). The only state laws expressly exempted from ERISA's broad preemptive sweep are those laws regulating insurance, banking and securities, and criminal laws of general application. 29 U.S.C. § 1144(b).

In light of this express Congressional declaration of preemptive intent, the Court need not determine whether and to what extent state law fraud and misrepresentation principles might conflict with or alter the

requirements of ERISA. See Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54, ___U.S.___, 82 L.Ed.2d 373, 382-83 (1984); Fidelity Federal Savings & Loan Assoc. v. De La Cuesta, 458 U.S. 141, 153 (1982). The import of the statutory language cannot be mistaken. As the Supreme Court stated in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 (1981), ERISA was "meant to establish pension plan administration as exclusively a federal concern."

Recently, in Shaw v. Delta Air Lines, Inc., 463 U.S. 85, (1983), the Supreme Court confirmed ERISA's broad preemptive sweep and further confirmed that the term "relate to" as used in the

Act was to be given a liberal and broad interpretation. As noted by the Court, it was the intent of Congress to eliminate all possibility of conflict with state law principles and to make the field of employee benefit plans exclusively federal in nature. 463 U.S. at 99-100, 105. Indeed, Congress considered and rejected a proposal to limit the preemptive scope of the statue to the specific areas and issues concerning employee benefit plans directly regulated by ERISA's express provisions, reasoning that "[s]uch a formulation raised the possibility of endless litigation over the validity of state action that might impinge on the federal regulatory scheme." Shaw v.

Delta Air Lines, Inc., 463 U.S. at 99-100, n.20 (9183), quoting 120 Cong. Rec. 29942. See also Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977), affirmed 571 F.2d 502 (9th Cir. 1978), cert. denied 439 U.S. 831 (1978); In re C.D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1130-31, n.4 (E.D. Pa. 1977), affirmed 582 F.2d 1273 (3rd Cir. 1978). thus, the settled construction of 29 U.S.C. § 1144(a) is that it preempts not only state laws dealing with subject matters directly covered be ERISA, but also any state laws which "relate" either directly or indirectly to an employee benefit plan. Shaw v. Delta Air Lines, 463 U.S. at 98-100; Alessi v. Raybestos-Manhatten,

Inc., 451 U.S. at 525. Accord, Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1977), cert. denied 435 U.S. 980 (1978); District 65, UAW v. Harper & Row Publishers, Inc., 576 F. Supp. 1468 (S.D. N.Y. 1983). See generally American Progressive Life and Health Ins. Co. of New York v. Corcoran, 715 F.2d 784 (2d Cir. 1983); Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations, 599 F.2d 205 (7th Cir. 1979), cert. denied 444 U.S. 1031 (1980).

In the instant case, it is clear that the state law claims of fraud and conspiracy to defraud relating to the terms of the Amoco-Norgas sale are preempted. As noted above, the trust of these claims is the failure to accurately

report or disclose the terms of the Norgas benefit plan and the plaintiffs' benefit rights following the sale. Thus, it can hardly be disputed that, insofar as state law fraud principles are relevant here, they relate to the administration of an employee benefit plan governed by ERISA and are thus preempted.[18] See Justice v. Bankers Trust, _____ F. Supp. ____ (CV-83-L-5188-NE)(N.D. Ala. April 19, 1985)(state law claims of fraud based upon suppression of material facts relating to employee benefit plan preempted by ERISA); District 65, UAW v. Harper & Row Publishers, Inc., 576 F. Supp. at 1487 (state common law claims of fraud, conversion, unjust enrichment, and

tortuous interference with contact preempted by ERISA); Ogden v. Michigan Bell Telephone Co., 571 S. Supp. 520, (E.D. Mich. 1983) (state common law fraud claim dismissed as preempted by ERISA); Whitaker v. Texaco, Inc., 566 F. Supp. 745 (N.D. Ga. 1983)(state law misrepresentation and breach of fiduciary duty claims preempted by ERISA); Ziskind v. Retail Clerks International Association, 3 E.B.C. 1012, 1014-1015 (E.D. Cal. 1982)(state cause of action for negligent misrepresentation preempted by ERISA). Cf. Russell v. Massachusetts Life Ins. Co., 722 F.2d 482 (9th Cir. 1983), cert. granted ____ U.S. ____, 83 L.Ed.2d 29 (October 2, 1984)[19] (state law tort claims for negligent and

intentional infliction of emotional distress preempted by ERISA); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981), cert. denied 454 U.S. 968 (1981)(state common law tortuous interference with contract claim preempted by ERISA); Kelly v. IBM, 573 F. Supp. 366 (E.D. Pa. 1983), affirmed 746 F.2d 1467 (3d Cir. 1984)(state law wrongful discharge claim preempted by ERISA); UAW v. Dyneer Corp., 4 E.B.C. 1486, 1488 (N.D. Ohio 1983), affirmed 747 F.2d 335 (6th Cir. 1984)(various state law claims, including tort claim for conversion, preempted by ERISA); Shaw v. Association of Machinists & Aerospace Workers Pension Plan, 563 F. Supp. 653 (C.D. Cal. 1983)(state common law breach

of contract claim preempted by ERISA). Indeed, in the present case, it is important to note that the plaintiffs' claims of misrepresentation and conspiracy to misrepresent deal with an area already specifically regulated by ERISA-namely, reporting and disclosure of plan terms, provision of information to participants, the content of plan descriptions, and so on. See e.g., 29 U.S.C. §§ 1021 through 1030. To allow plaintiffs to pursue the present common law claims of misrepresentation would bring to pass the very result which Congress intended to prohibit - the possibility of inconsistent state law regulation of matters relating to the administration of employee benefit plans.

For these reasons, the Court finds that plaintiffs' state law claims of fraud and conspiracy to defraud relating to misrepresentation or nondisclosure of material facts about the crediting of Amoco service under Norgas ERISA plans are indeed preempted. Defendants are entitled to judgment as a matter of law with respect to these claims.[20]

II. The ERISA Claims

Having thus disposed of the plaintiffs state law claims, we now come to the core of this lawsuit. Although the sale of Amoco's LPG facilities had all the earmarks of a routine business transaction, plaintiffs insist that insofar as their employee benefits were concerned, the terms of the sale and the

manner in which it was accomplished violated several provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. The primary theme of these ERISA claims is that Amoco and Norgas violated a supposed duty under ERISA to effect the LPG sale on terms that would ensure that years of service with Amoco would be credited in calculating benefits under Norgas benefit plans.

ERISA is a comprehensive and reticulated statute designed to prescribe minimum vesting and accrual standards for qualifying employee retirement benefit plans; to establish minimum rules for employee participation and plan funding; to delineate fiduciary standards for plan

managers; and to otherwise ensure that legitimate employee pension expectations are not defeated. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 511 (1981). For purposes of the issues presented here, the pertinent portion of ERISA is Subchapter I of the Act, 29 U.S.C. §§ 1001-1144.

ERISA divides employee benefits covered by the Act into two categories: (1) pension benefits (referred to herein as "retirement" benefits); and (2) all other benefits (including, for example, medical and disability). 29 U.S.C. § 1002(1)-(2). The Act terms the second category "welfare" benefits. For both categories of benefits, retirement and welfare, ERISA imposes certain

disclosure and reporting requirements (Subchapter I, Part 4, set forth at 29 U.S.C. §§ 1101-1114). Perhaps most importantly, ERISA requires that employer plans providing both categories of benefits be established and maintained in writing, 29 U.S.C. § 1102(a), and that the rights conferred by the terms of such written plans are enforceable by the participants as a matter of federal law. 29 U.S.C. § 1132.

In addition, for certain but not all retirement benefits, ERISA imposes minimum requirements for the participation in and the vesting of benefits under retirement plans (Subchapter I, Part 2, set forth at 29 U.S.C. §§ 1051-1061) and for the funding

of plans to ensure that assets are available to pay the retirement benefits when the time comes (Subchapter I, Part 3, set forth at 29 U.S.C. §§ 1081-1086). These participation, vesting, and funding requirements are not applicable to welfare benefit plans. 29 U.S.C. §§ 1051, 1081(a)(1). The vesting requirements for retirement benefits apply to what the particular plan establishes as the "normal retirement benefit" that will be paid at the "normal retirement age". 29 U.S.C. § 1053(a). With whatever "normal retirement benefit" the particular plan establishes as the reference, ERISA sets minimum benefit be attributed to the employee as a function of his years of participation in the plan

(which, for present purposes, may be considered to be his years of service with the employer). 29 U.S.C. § 1054. ERISA's minimum vesting standards require that after a number of years of service, an employee's "right" to whatever accrued benefit he has earned to that time cannot be forfeited even though his service with the employer terminates before he reaches what the particular plan defines as the "normal retirement age." 29 U.S.C. § 1053.

A retirement benefit that is vested may still be "contingent" in several important respects. 29 U.S.C § 1053(a)(3)(A)-(D). In particular, a plan may permissibly provide that vested benefits are not payable until normal

retirement age and, if the employee dies before that time, his benefit, while vested, generally need not be paid. _See, e.g._, _Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust_, 662 F.2d 617, 619-620 (9th Cir. 1981). On the other hand, welfare benefits and the so-called "ancillary" retirement benefits, including early retirement benefits such as plaintiffs complain of in this case, may be "contingent" in a much more persuasive sense -- ERISA does not require that such benefits be vested and nonforfeitable. _Sutton v. Weirton Steel Division of National Steel Corp._, 724 F.2d 406 (4th Cir. 1983), _cert_. _denied_, ____ U.S. ____, 104 S.Ct. 2387 (1984); _Petrella v. NL Industries,_

Inc., 529 F. Supp. 1357, 1364-1366 (D. N.J. 1982). Accordingly, an employee's "rights" to such benefits may be forfeited entirely if his service with the employer is terminated before he becomes eligible under the plan's terms for payment of such benefits. Petrella v. NL Industries, Inc., 529 F. Supp. at 1364-65.

It is equally important to note that ERISA does not require that employers provide employee benefits at all; does not confer a general right to continued employment in order to earn vested retirement benefits or to become eligible for other benefits; and does not mandate the level or amount of such benefits.

> [A]n employer has no affirmative duty to provide employees with a pension plan. H.Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Cong. and Ad. News, 4670, 4677. In enacting ERISA, Congress continued its reliance on voluntary action by employers by granting substantial tax advantages for the creation of qualified retirement programs. Id. Neither Congress nor the courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan should provide. In particular, courts have no authority to decide which benefits employers must confer upon their employees; these are decisions which are more appropriately influenced by forces in the marketplace and, when appropriate, by federal legislation.

Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454, 456 (6th Cir. 1984), cert. denied ____ U.S ____, 105 S.Ct. 786 (1985)(emphasis in original).

Accord Alessi v. Raybestos-Mahnattan, Inc., 451 U.S. at 511, 512-14.

A claim of wrongful denial or deprivation of employee benefits under ERISA involved a two-pronged inquiry: (1) is the action or conduct complained of contrary to the terms of the plan itself? (2) are the terms of the plan or the conduct complained of independently violative of ERISA's substantive requirements?

In this case, the answer to the first question is undisputed. The Standard Plan itself did not confer upon plaintiffs a right to guaranteed or continued employment with Amoco in order to earn retirement benefits. Rather, the Plan expressly provided that:

> Nothing contained in this Plan shall be construed as a contract of employment between an employer and any employee, or as a right of any employee to be continued in the employment of an employer.

(Webb Affidavit, Ex. A at § 14.07, Appendix in Support of Amoco's Motion for Summary Judgment at A354). Nor did the terms of that plan require that Amoco arrange for plaintiffs' years of service with Amoco ~~to~~ be credited for all purposes under the retirement plan of any future purchaser of the LPG operation. Nor do plaintiffs contend that there was a forfeiture of any vested retirement benefit to which they were entitled under the Standard Plan. Rather, those plaintiffs who were vested under the Standard Plan at the time of the sale of the LPG operation to Norgas are

receiving, at their option under that plan, an annuity based upon their length of service with Amoco. (Pretrial Order at 9).[21] Finally, plaintiffs have never even alleged that the terms of any other benefit plan available to employees of Amoco were violated by the Amoco-Norgas sale.

Accordingly, despite plaintiffs' generic allegations that the Amoco-Norgas transaction deprived them of "benefit rights," their claim that the Amoco-Norgas agreement could have been more generous in its benefit provisions, standing alone, has no force in law. Because nothing in the plans available to Amoco employees required otherwise, plaintiffs' complaints that their years

of service with Amoco are not credited for all purposes under Norgas' retirement plan and their related complaints about the effect of the sale on their pension rights are legally immaterial unless ERISA forbids the arrangement agreed upon by Amoco and Norgas. Apart from the specific restrictions set forth in the statute, "ERISA permits the total benefit levels and formulas for determining their accrual before completion of 15 years of service to vary from plan to plan." Alessi, 451 U.S at 513-14. Thus, because there is no allegation of breach of the terms of any plan available to them as Amoco employees (or for that matter, any Norgas plans), plaintiffs' claims fail as a matter of law unless the Amoco-Norgas

sale violated one or more of ERISA's specific restrictions.

The plaintiffs claim that several ERISA's specific substantive provisions have in fact been violated on the facts of this case:

(1) Plaintiffs allege that Amoco and Norgas violated or conspired to violate 29 U.S.C. § 1060(b)(2) by failing to credit plaintiffs' prior years of service with Amoco for purposes of benefit accrual under the Norgas retirement plan.

(2) Plaintiffs allege that Amoco and Norgas violated or conspired to violate 29 U.S.C. § 1056 by interfering with plaintiffs' possible future

attainment of early retirement benefits under the Amoco plan.

(3) Plaintiffs allege that Amoco (acting in concert with Norgas) violated a fiduciary duty under 29 U.S.C. § 1104 to act solely on behalf of the plan participants in negotiating the terms of the sale insofar s those terms affected the plaintiffs' benefits under the Amoco plan.

(4) Plaintiffs allege that Amoco (acting in concert with Norgas) violated 29 U.S.C. § 1106 by engaging in a transaction involving the plan on behalf of parties whose interests were adverse to the interests of plan participants, and by dealing with the assets of the plan in their own interests.

(5) Plaintiffs allege that Amoco and Norgas violated or conspired to violate 29 U.S.C. §§ 1140 and 1141 by interfering with rights or the attainment of rights to which plaintiffs might have become entitled under the Amoco plan.

(6) Plaintiffs allege that Amoco (but not Norgas) violated the reporting and disclosure requirements of 29 U.S.C. §§ 1022 and 1024 by failing to disclose the circumstances and modifications which might result in disqualification, ineligibility, denial or loss of benefit under the Amoco plan.

In short, the plaintiffs have invoked every section of ERISA which is even colorably applicable to the facts of this case. As will be seen, however

these ERISA violations are more easily pleaded than proved. Although ERISA's substantive provisions have been systematically invoked and clothed in verbiage and allegations which carefully track the text of the Act, in each instance the plaintiffs proceed from faulty premises and inadequate foundations of fact. Consequently, each of their claims under ERISA fails as a matter of law.[22] We will proceed to address each claim separately.

A. The Claims Under 29 U.S.C. § 1060

The plaintiffs insist that by failing to credit their prior years of service with Amoco in calculating the accrual of benefits under the Norgas plan, Amoco and Norgas violated 29 U.S.C.

§ 1060. That section provides in pertinent part:

> (b) For purposes of this part and part 3 --
>
> (1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employee, and
>
> (2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of

> the Treasury, be treated as service for the employer.

29 U.S.C. § 1060(b).

This provision forms a crux of this entire controversy, for the heart of the plaintiffs' case is and always has been their claim that they should receive credit for their years of service with Amoco for purposes of computing benefits under the Norgas retirement plan.[23] Plaintiffs allege that defendants violated this provision of ERISA by

> fail[ing] to maintain the predecessor plan so that years of service would be treated as years with Norgas or in the alternative to maintain a separate plan from the predecessor plan but to have years of service in

> the predecessor corporation (Amoco) treated as years of service for the employer (Norgas) ([29 U.S.C. §] 1060).

(Pretrial Order at 14).

The allegation "in the alternative" notwithstanding, subsection (b)(1) is irrelevant to this case. It is undisputed that Norgas and its employees were part of a pre-existing plan. Apart from the fact that about 400 people (out of a total of approximately 56,000) left the Standard Plan due to the Norgas sale, the sale had no effect on the Standard Plan. Nothing in the words of § 1060(b)(1) requires that the plan of a predecessor employer <u>actually be maintained</u> by a successor employer, either "in the alternative" to the

requirements of subsection (b)(2) or otherwise. Rather, the plain words of subsection (b)(1) provide only that service with a predecessor employer "shall be treated as service" with a successor employer _if_ the successor elects to maintain the plan of the predecessor. Moreover, that plain meaning is confirmed by the legislative history. _See_ House Conference Rep. No. 93-1280, _reprinted in_ 1974 _U.S. Code Cong.& Ad.News_ 5038, 5047 ("[s]ervice with a predecessor employer must be counted for purposes of the plan if the successor employer continues to maintain the plan of the predecessor employer...") (emphasis supplied). Where, as here, a predecessor plan is not maintained by a

successor employer, § 1060(b)(1) is simply inapplicable.[24]

Nor is Section 1060(b)(2) the oasis that plaintiffs would like it to be. The language of subsection (b)(2) requires a successor employer to credit an employee's years of service with a predecessor employer for purposes of determining that employer's retirement benefits only if and to the extent the Secretary of Treasury issues regulations requiring such service to be credited. Since the Secretary of Treasury has never required, by regulation or otherwise, that such service be credited, it is clear from the statutory language that, for now at least, such service need not be credited by a successor employer.

Whether the failure to promulgate regulations requiring successor employers to credit service with a predecessor employer has been a conscious policy decision in the part of the Secretary or not, the plain import of § 1060(b)(2) is that Congress chose to vest the Secretary with the discretionary authority to decide if and to what extent such service should be credited. Unless and until the Secretary requires otherwise, Congress obviously chose as a matter of policy not to require prior service with a predecessor employer to be taken into account in calculating benefits under the successor employer's separate retirement plan.

Plaintiffs' claim under § 1060(b)(2) in essence asks this Court to construe § 1060(b)(2) as if it read: "service for such predecessor shall be treated as service for the employer except as regulations prescribed by the Secretary of the Treasury otherwise allow." While Congress could easily have drafted the subsection that way, it chose not to do so. Rather, it provided that service with a predecessor shall be treated as service with a successor only "to the extent provided" by any affirmative regulations the Secretary of Treasury might choose to promulgate. This Court is bound by the Congressional directive embodied in the clear language of the statute, absent a clearly expressed

legislative intention to the contrary. See Dickerson v. New Banner Institute, Inc., 460 U.S. 103, 110 (1983); American Bank & Trust Co. v. Dallas County, 463 U.S. 855, 77 L.Ed.2d 1072, 1078 (1983); North Dakota v. United States, 460 U.S. 300, 312 (1983); Consumer Product Safety Commission v. GET Sylvania, Inc., 447 U.S. 102, 108 (1980); United States v. 640.00 Acres of Land in Dade County, Florida, ____F.2d _____ (No. 82-5510) (11th Cir. April 3, 1985); Scarborough v. OPM, 723 F.2d 801, 812 (11th Cir. 1984).

There is nothing in ERISA's legislative history to cast doubt upon the plain meaning of the statute, much less anything amounting to "a clearly expressed legislative intention to the

contrary." American Bank & Trust Co. v. Dallas County, 77 L.Ed.2d at 1078. The House Conference Report declares quite simply that except where the successor employer maintains the plan of a predecessor employer, the question of whether service with the predecessor is to be credited is left entirely to the determination of the Secretary of Treasury:

> Service with a predecessor must be counted for purposes of the plan if the successor employer continues to maintain the plan of the predecessor employer.... The question of the extent to which such service must be counted in other circumstances is to be determined under regulations.

House Conference Report No. 93-1280,

reprinted in 1974 U.S. Code Cong. & Adm. News at 5038, 5047, 5052. Other portions of the legislative history make it even clearer that § 1060(b), standing alone, does not require the crediting of prior service with a predecessor employer:

> [W]here the employee moves from one employer to another the ancillary benefits (which are usually on a contingency basis) would often be provided by the new employer, whereas the new employer would not provide pension benefits based on years with the old employer.

House Report No. 93-807, reprinted in 1974 U.S. Code Cong. & Adm. News 4670, 4726.

Apparently, only one court has addressed the issue of a successor

employer's obligation to credit prior years of service with a predecessor employer for retirement benefit purposes. In _Vorpahl v. Union Oil Co. Retirement Plan_, 4 E.B.C. 2565 (D. Minn. 1983), _affirmed_ ____ F.2d _____(No. 83 2528 (8th Cir. December 14, 1984), the court analyzed the issue and concluded that a successor employer is not required to credit an employee's years of service with a predecessor employer for purposes of determining that employer's benefits under the successor employer's pension plan. However, rather than focusing its inquiry on Section 1060(b)(2), the _Vorpahl_ court looked to Department of Labor regulations defining "year of

service." This regulation states in pertinent part:

> § 2530.204-1. Year of Participation for Benefit Accrual
>
> ***
>
> (b) Service Which May be Disregarded for Purposes of Benefit Accrual. (1) In calculating an employee's period of service for purposes of benefit accrual under a defined benefit pension plan, § 204(b)(3) [29 U.S.C. § 1054(b)(3)] of the Act and § 411(b)(3) of the [Internal Revenue] Code permit the following service to be disregarded: service before an employee first becomes a participant in the plan; ...

29 C.F.R. § 2530.204-1(b) (1976). Thus, not only has the Secretary of Treasury chosen not to issue regulations requiring

an employee's service with a predecessor employer to be credited in calculating retirement benefits under the successor's own plan, but the Department of Labor regulation defining "year of service" expressly permits an employer to disregard an employee's service before he becomes a participant in its pension plan. See Vorpahl, 4 EBC at 2575. Therefore, since plaintiffs were not participants in the Norgas retirement plan during their prior years with Amoco, Norgas is under no statutory obligation to credit their years of service with Amoco for purposes of calculating their Norgas retirement benefits.

Finally, in response to plaintiffs' apparent argument that this Court should

fashion such a requirement, it is important to note the very real dangers involved in such an endeavor. In the first place, judicial exercise of the authority delegated to the Secretary of Treasury would contravene the language of the statute and the principles of statutory construction discussed above, as well as the clearly expressed legislative intent of Congress that the "question of the extent to which such service must be counted. . .is to be determined under regulations." House Conference Report No. 93-1280, 1974 U.S. Code Cong. & Adm. News 5038, 5047, 5052. Furthermore, settled legal principles dictate that courts may not exercise the authority to promulgate legislative rules

that a statute delegates to an administrative agency or other rulemaking body. See, e.g., Sierra Club v. Indiana-Kentucky Electric Corp., 716 F.2d 1145, 1154 (7th Cir. 1983). See also Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army, 356 F. Supp. 14, 18 (S.D. N.Y. 1973) ("where Congressional action has provided an administrative process for the resolution of particular subjects, great respect must be paid to the presumptive exclusivity of that process").

From a more practical viewpoint, the creation of crediting requirements by a court under § 1060(b)(2) would involve numerous questions of policy, the resolution of which would have

consequences far beyond the case at hand. Requiring a successor employer to credit an employee's years of service with a predecessor employer could frustrate the very purpose of ERISA. In large part, ERISA was enacted to protect and secure the viability and desirability of employer-established retirement programs for employees. H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Adm. News 4639; S. Rep. No. 383, 93d Cong. 2d Sess, reprinted in 1974 U.S. Code Cong. & Adm. News 4890. However, requiring a successor employer to credit an employee's years of service with a predecessor employer for retirement purposes would dramatically increase an employer's cost of operating

a retirement benefit plan for its employees, since the successor would be required to immediately fund a retirement plan much more heavily whenever it adds employees previously covered under a predecessor employer's plan. Faced with this dilemma, many employers might choose not to establish or continue a retirement plan rather than incur the significant cost of funding an employee's years of service with a predecessor employer. Alternatively, the employer may simply choose not to hire the employees of the predecessor.[25] In either event, the employees in question would be adversely affected--i.e., they would either lose their retirement plan or lose their jobs. Surely Congress could not have intended

such a severe result. Thus, it may not be altogether surprising that the Secretary of Treasury has chosen not to issue regulations imposing such a credit requirement.[26] This Court is hardly competent to second-guess such decisions of Congress and its delegates on difficult questions of legislative policy. The function of this Court is to apply the statutes, not to rewrite them.

In short, unless and until the Secretary of Treasury prescribed otherwise, Section 1060(b)(2) does not require a successor employer to credit an employee's service with a predecessor employer[27] in calculating the employee's retirement benefits under the successor's separate retirement plan. Accordingly,

the defendants are entitled to a judgment as a matter of law with respect to the Section 1060(b) claims.[28]

B. THE CLAIMS UNDER 29 U.S.C. § 1056

Plaintiffs next contend that by entering into the Amoco-Norgas sale defendants violated 29 U.S.C. § 1056, inasmuch as they interfered "with the rights of the plaintiffs in the attainment of service requirements necessary to obtain early retirement benefits." (Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at 37). This claim is specious. This section of ERISA is quite limited in scope and effect. It provides in pertinent part:

. . . Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which--

(1) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs on the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a

> participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

29 U.S.C. § 1056(a). In short, § 1056 merely requires that _if_ a plan provides early retirement benefits, an employee who has satisfied plan requirements as to years of service shall be entitled to

receive an actuarially reduced benefit upon reaching the early retirement age specified in the plan, even if that employee leaves the employer's service prior to attaining early retirement age. It is important to recognize that neither ERISA in general nor § 1056 in particular require a plan to provide early retirement benefits at all. Moreover, even if an employer does provide early retirement benefits, § 1056 itself does not confer upon plan participants any substantive right to continued employment in order to meet service requirements and qualify for early retirement benefits under the terms of the particular plan.

In the present case, it is undisputed that the terms of the Amoco plan go well beyond the minimum requirements of § 1056 by giving terminated employees the option to receive actuarially reduced benefits _immediately_ upon their termination rather than requiring that the terminated employees attain the early retirement age specified in the plan before receiving vested early retirement benefits. It is also undisputed that all plaintiffs who were vested under the Amoco plan elected that option and are currently receiving such payments. (_See_ Pretrial Order at 9). With this in mind, it is plain that the claim of a violation of § 1056 has no support whatsoever on this record. The

plaintiffs are apparently laboring under the misapprehension that ERISA in general and § 1056 in particular provide comprehensive protection of the inchoate interests of employees in such unfunded, contingent benefits. Such is not the case. _Cf_. _Sutton v. Weirton Steel Division of National Steel Corp._, 724 F.2d 406 (4th Cir. 1983), _cert._ _denied_ _____ U.S. _______, 104 S.Ct. 2387 (1984).

Because Section 1056 confers no substantive right to continued employment in order to earn vested rights to early retirement benefits, the defendants are entitled to judgment on the Section 1056 claims as a matter of law.[29]

C. THE CLAIMS UNDER 29 U.S.C.§ 1104

Plaintiffs next contend that Amoco and Norgas violated their fiduciary duties under 29 U.S.C. § 1104. That provision of ERISA provides in pertinent part:

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan ...

29 U.S.C. § 1104(a)(1). Plaintiffs base their claims of a violation of this section upon the following allegations:

> Amoco dealt with the plan and the assets of the plan in its own interests and not in the interests of the plan participants in that it received more money for the facilities by not transferring years of service and/or the accumulated benefits of the participants in the plan to Norgas and further were allowed to keep and maintain the additional sums of money in the plan for the use of other participants, including itself, to the damage of plaintiffs.

(Pretrial Order at 16). In other words, plaintiffs' theory with respect to their § 1104 claims is quite similar to the substance of their § 1060 claims: they claim that in negotiating the terms of

the sale of its LPG operation, Amoco was under a fiduciary duty to ensure that plaintiffs' years of service with Amoco would be credited for all purposes under the Norgas retirement plan, and that Amoco's failure to arrange a sale transaction meeting these standards violates the statute. Furthermore, although plaintiffs admit that Norgas was not a fiduciary with respect to the Amoco plan and hence owed no direct fiduciary duties to plaintiffs as beneficiaries of that plan,[29.5] they contend that Norgas is liable for assisting Amoco in the commission of a breach of Amoco's fiduciary duties. Cf. Donovan v. Daugherty, 550 F. Supp. 390, 411 (S.D. Ala. 1982) (holding that nonfiduciaries

may be accountable under ERISA for breaches of fiduciary duty which they help promote).[30]

Plaintiffs' claim under § 1104 is without merit. The fiduciary duty provisions of ERISA are not implicated in the sale of a business or a portion of a business merely because the terms of the sale will affect the terms and conditions of contingent future retirement benefits.

This is lucidly illustrated by the related cases of Sutton v. Weirton Steel Division of National Steel Corp., 567 F. Supp. 1184 (N.D. W.Va. 1983), and Dhayer v. Weirton Steel Division of National Steel Corp., 571 F. Supp. 316 (N.D. W.Va. 1983), both of which were affirmed in

Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied ___ U.S.____, 104 S.Ct. 2387 (1984). In Sutton and Dhayer, plaintiffs included both union and non-union employees of National Steel's Weirton Steel Division. There, as here, the plaintiffs challenged the sale of a division of their employer's business and the terms of the underlying transaction on the grounds that, as a result of the sale, their non-vested retirement and early retirement benefits and other contingent benefits would be adversely affected. Specifically, the terms of the sale provided that the seller's existing benefit plan would be amended so that the sale itself would not

trigger entitlements to different types of early retirement and severance pay benefits. See Sutton, 724 F.2d at 409. As in the present case, the plaintiffs were to become employees of the successor employer, and their eligibility for early retirement benefits was to be more limited than under the predecessor employer's plan. Sutton, 567 F. Supp. at 1190; Dhayer, 571 F. Supp. at 321. There, as here, the employees alleged that avoidance of pension and welfare benefit obligations was the employer's motive in agreeing to the sale and its terms. Sutton, 567 F. Supp. at 1198; Dhayer, 571 F. Supp. at 326.

Because the cases were being decided on summary judgment, the district court

specifically assumed as true "that avoiding future pension obligations was the sole motivation of [the employer-seller]." Sutton, 567 F. Supp. at 1198; Dhayer, 571 F. Supp. at 326. Nevertheless, the court squarely rejected the plaintiffs' claim that, under § 1104, National Steel had a fiduciary obligation to act solely in the interest of beneficiaries in negotiating the terms of the sale. In so holding, the court noted that ERISA simply does not prohibit a company from eliminating previously offered benefits which are neither vested nor accrued. Sutton, 567 F. Supp. at 1196, 1200; Dhayer, 571 F. Supp. at 324, 328-29. Accord Petrella v. N.L. Industries, 529 F. Supp. 1357, 1365-66

(D. N.J. 1982). Likewise, the court held, there is no requirement that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants:

> When acting on behalf of the pension fund, there is no doubt that [an employer who is also a fiduciary with respect to a plan] must act solely to benefit participants and beneficiaries. However, it is the Court's opinion here that when a corporate employer negotiates the terms of the sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of future benefits (at least those that are not protected by ERISA's vesting and

> nonforfeitability provisions), do not implicate fiduciary duties as to the pension fund. Such negotiations are distinct from actually administering a plan and conducting transactions affecting the monies and property of the plan's fund. In other words, the mere fact that a company has named itself as pension plan administrator or trustee does not restrict it from pursuing reasonable business behavior in negotiations concerning pension benefits not otherwise affected by the requirements of ERISA. See NLRB v. Amax Coal Co., 453 U.S. 322, 333 n.16 ... (1981).

Sutton, 567 F. Supp. at 1200-01; Dhayer, 571 F. Supp. at 328-29. Accordingly, the district court granted summary judgment in favor of the employer-seller.

On appeal, the Fourth Circuit affirmed. After noting the district

court's assumption that National Steel's sole motivation for the sale was avoiding future pension obligations, the appellate court held first that ERISA does not require the vesting and nonforfeitability of early retirement and other ancillary benefits. The court further held that ERISA does not impose any fiduciary obligations on an employer to maintain and protect future contingent benefit rights in negotiating the sale of a division:

> Congress ... has not prohibited an employer who is also a fiduciary from exercising the right accorded other employers to renegotiate or amend, as the case may be, unfunded contingent benefits payable before the normal retirement age. The changes, accomplished in

> this matter, are not to be reviewed by fiduciary standards.

724 F.2d at 410-411.

Considering the Weirton Steel decisions in the context of the present case, it is clear that plaintiffs' claims under 29 U.S.C. § 1104 are without merit. As noted in the previous discussion of 29 U.S.C. § 1060, infra, ERISA presently imposes no requirement that service with a predecessor employer be credited in calculating benefits under the successor-employer's plan. Thus, neither Norgas nor Amoco violated ERISA in their capacity as employers by failing to include such a provision in the sale agreement. Moreover, despite the fact that the sale obviously had certain

effects upon plaintiffs' benefits under the Amoco plan, clearly neither Amoco nor Norgas had any fiduciary duty under ERISA to act solely in the plaintiffs' interests in negotiating the terms upon which the LPG operations were to be sold. A contrary holding would mean that every corporate business decision which had any possible collateral effect on pension benefits would have to be made "solely in the interests of pension plan beneficiaries and participants." Cf. Sutton, 567 F. Supp. at 1200; Dhayer, 571 F. Supp. at 328. At least insofar as contingent future benefit rights are concerned, Congress clearly could not have intended such a pernicious result.

The Court finds the Weirton Steel cases persuasive and controlling, and agrees that "when a corporate employer negotiates the sale of a division, whose employees are participants in a pension plan, the negotiations that affect the terms and conditions of [non-vested] future pension benefits ... do not implicate fiduciary duties as to the pension fund." Sutton, 567 F. Supp. at 1201; Dhayer, 571 F. Supp. at 328. Plaintiffs have cited no contrary authority even arguably on point.

If Congress explicitly considered the question of whether successor employers must credit service with a predecessor employer, and left the question to be determined under Treasury

Regulations, it would seem clear that Congress could not have intended § 1104 to implicitly require such crediting in any event. The plaintiffs' theory under § 1104 would seem to render § 1060(b) essentially redundant, even under their own reading of the latter provision. Based upon the foregoing discussion, then, the Court finds that defendants[31] are entitled to judgment as a matter of law with respect to the claims made under 29 U.S.C. § 1104.

D. THE CLAIMS UNDER 29 U.S.C. § 1106

Plaintiffs next allege that Amoco and Norgas violated 29 U.S.C. § 1106, which provides, *inter alia*:

(a) ...

(i) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such a transaction constitutes a direct or indirect --

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

...

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan;

(b) A fiduciary with respect to a plan shall not --

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests

> of its participants or beneficiaries, or receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets cf the plan.

. . .

29 U.S.C. § 1106.

Plaintiffs contend that Amoco was a fiduciary with respect to the Amoco Plan and that by selling the LPG operations without ensuring that service with Amoco would be credited for all purposes under the Norgas retirement plans, Amoco acted in a "transaction involving the plan" on behalf of parties whose interests were adverse to the interests of plan participants and beneficiaries; dealt with the assets of the plan in its own interests; and caused the plan to emerge

in a transaction which indirectly transferred "a benefit" to a party-in-interest -- namely Amoco. This, say the plaintiffs, constitutes a prohibited transaction under §1106.[32]

Although the plaintiffs have attempted to couch their allegations in the language of the statute itself, it is plain that § 1106 applies only to transactions to which the plan itself is a party or in which the monies, property or fiscal assets of the plan are involved, and it has been construed accordingly. Sutton v. Weirton Steel Division of National Steel Corp., 567 F.Supp. 1184, 1199 (N.D. W.Va. 1983); Dhayer v. Weirton Steel Division of National Steel Corp., 571 F. Supp. 316,

327 (N.D. W.Va., 1983) [both affirmed in Sutton v. Weirton Steel Division of National Steel Corp., 724 F.2d 406 (4th Cir. 1983), cert. denied _____ U.S. _____, 104 S. Ct. 2387 (1984)]. Accord, Donovan v. Bierwirth, 680 F.2d 263, 270 (2d Cir. 1980), cert. denied 459 U.S. 1069 (1982). Congress did not intend an expansive interpretation of Section 1106. Evans v. Bexley, 750 F.2d 1498, 1500 n.3 (11th Cir. 1985).

In the present case, the evidence stands uncontroverted that the Standard Plan was not a party to the Amoco-Norgas transaction (See Affidavit of William C. Jackson). Nor did the LPG facilities involve any transfer of the

funds or assets held by the Standard Plan. (Id).

Plaintiffs' only effort to establish evidentiary support for the § 1106 claim is their contention that "Amoco did receive more money for the [LPG] participants in the plan to Norgas." (Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at 41; see also Pretrial Order at 15-16). However, the evidence is undisputed that no funds or property held by the plan were transferred, and plaintiffs were not deprived of any benefit required to be vested and nonforfeitable by ERISA. Indeed, plaintiffs admittedly received all benefits to which they had already become entitled under the terms of the

Standard Plan by the time of the sale and their consequent termination of employment with Amoco. As a matter of law, Amoco's contingent future liability for non-vested benefits -- _i.e._, plaintiffs' inchoate interest in their "years of service" with Amoco for purposes of the putative benefits to which they _might_ have become entitled had they continued to work for Amoco -- did not itself constitute an "asset" of the plan for purposes of § 1106, so as to prohibit Amoco from dealing with those contingent liabilities in its own interest or in ways adverse to the interests of plan participants and beneficiaries. _See_ _Sutton v. Weirton Steel Division of National Steel Corp._,

724 F.2d at 411-412. As noted above, the mere fact that an employer also acts as a plan fiduciary[33] does not restrict it from pursuing reasonable business behavior in negotiating the sale of a division, even though the terms ultimately agreed upon modify or eliminate the contingent rights of transferred employees to benefits under the seller's ERISA plan which are neither vested nor accrued. Sutton, 567 F. Supp. at 1200-01; Dhayer 571 F. Supp. at 328-29. See also Sutton, 724 F.2d at 411.

Because there is no evidence that the Standard Plan was a party to the Amoco-Norgas sale or that fiscal assets of the Standard Plan were involved in the transaction, there exists no genuine

issue of material fact as to plaintiffs' claims under 29 U.S.C. § 1106. Therefore, as to these matters, defendants are entitled to judgment as a matter of law.

E. The Claim Under 29 U.S.C. § 1140

The next arrow in the plaintiffs' crowded quiver is 29 U.S.C. § 1140:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this title. . . or for the purpose of interfering with the attainment of any right to which such participant

may become entitled under the plan [or this title]. . .

The plaintiffs contend that by agreeing to the sale of the LPG operation on terms that did not assure the crediting of service with Amoco for all purposes under the Norgas retirement plan, Amoco and Norgas unlawfully "discriminated against the plaintiffs for the purpose of interfering with the attainment of the rights to which the plaintiffs might [have] become entitled under the [Amoco] Plan." (Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at 25-26).

The plaintiffs misapprehend the purpose of Section 1140. That provision is not intended to prohibit the sale of

going businesses or to require a successor employer to credit service with a predecessor employer -- indeed, any such construction would render 29 U.S.C. § 1060 rather meaningless. Nor is Section 1140 intended to impose a fiduciary duty on employers to act solely in the interests of plan participants and beneficiaries in negotiating the terms of sale of a business or division. Such matters are the province of Sections 1104 and 1106, which as discussed above, do not impose such a duty. See Sutton v. Weirton Steel Division, 724 F.2d 406, 410 (4th Cir. 1983) cert. denied ____ U.S.__, 104 S.Ct. 2387 (1984). Rather, Section 1140 is intended simply to prohibit discriminatory harassment or adverse

treatment of a particular employee which amounts to or threatens "constructive discharge," and which is carried out for the purpose of interfering with the employee's attainment of future benefits or punishing the employee for the exercise of protected rights. West v. Butler, 621 F.2d 240 (6th Cir. 1980). This meaning is confirmed by the legislative history of the provision:

> Most collective bargaining agreements protect employees against discharge without good cause and provide effective enforcement machinery in arbitration proceedings whose results are enforceable under section 301 of the Labor-Management Relations Act. But roughly half of

all pension participants are not unionized and so they lack protection. Especially vulnerable are managers and executives whose substantial pension potentialities provide an incentive to their discharge before vesting. The managers of the bill ought to think twice too. <u>Discipline and discrimination can be so unpleasant as to amount to constructive discharge, a term used by the National Labor Relations Board. That can be the type of harassment which does not say that one is fired, but makes living such a hell that a person wishes he did not have to hang on and endure.</u>

In recognition of the problem, section 610 of S.4 as originally reported -- made it illegal to "discharge, fine, suspend, expell [sic], discipline or discriminate" against plan participants to defeat rights under the act or a plan. The language parallels section 8(a)(3) of the National Labor Relations Act and should do the trick -- but only if an adequate enforcement machinery exists.

119 Cong. Rec. 30374 (views of Senator Hartke, speaking on behalf of his proposal that the Secretary of Labor be direct to establish administrative procedures for enforcing the provision that became 1140)(emphasis supplied).

See also West v. Butler, 621 F.2d at 245; Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 916-17 (2d Cir. 1982), cert. denied 459 U.S. 1039 (1982) ("this section is designed to prevent unscrupulous employers from discharging or harassing plan participants in order to keep them from realizing their vested pension rights").

The undisputed facts of this case establish that there was no harassment or discriminatory treatment of the plaintiffs amounting to the kind of "constructive discharge" or "discrimination" prohibited by 29 U.S.C. § 1140. Indeed, the only evidence of "discrimination" relied upon by the plaintiff in this connection is the mere

fact that as a consequence of the sale, they were "prevented from attaining [the benefit] rights toward which they had been working as employees of Amoco." (Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at 28). However, that consequence is part of nearly every sale or termination of a going business or division. ERISA simply does not require that every purchaser of a going concern credit service with a predecessor employer for purposes of the successor's separate plan, nor does it require that a successor's plan be identical in every respect to the predecessor's. Certainly Section 1140 contains no such requirement, express or implied. Here,

as in _Aronson v. Servus Rubber Division of Chromalloy_, 730 F.2d 12 (1st Cir. 1984), _cert. denied_, ____ U.S. ____, 105 S. Ct. 431 (1984), the plaintiffs' claim is grounded upon

> a misreading of a section which relates to discriminatory conduct directed against individuals, not to actions involving the plan in general. The problem is with the word "discriminate." An overly literal interpretation of this section would make illegal any partial termination, since such terminations obviously interfere with the attainment of benefits by the terminated group, and, indeed, are expressly intended so to

interfere. Such cannot be the intent of the section, where the statute expressly recognizes partial terminations. <u>See</u> 29 U.S.C. § 1343(b)(4)(incorporating Tax Code definitions, 26 U.S.C. § 411(d)(3)). This is not to say that a plan could not be discriminatorily modified, intentionally benefiting, or injuring, certain identified employees or a certain group of employees, but a partial termination cannot constitute discrimination per se. A termination that cuts along independently established lines -- here separate divisions -- and that has a readily apparent business justification, demonstrates no

invidious intent. . . Nor can plaintiffs claim they were discriminated against with respect to participants in defendants' [other] operations that [were] not being [sold]. . . We cannot regard it as discriminatory for defendant to make voluntary contributions to continuing employees to maintain their morale, but not to make such to departing employees of the admittedly profitless, wound-up branch of its business.

Aronson, 730 F.2d at 16.

In the present case, the uncontroverted evidence adduced by the defendants establishes that the sale was motivated by legitimate business concerns.

The evidence on this point reveals that, prior to the sale, Amoco conducted profitability studies of the LPG operation. This study revealed that the LPG operation was not sufficiently profitable, and would be even less profitable in the future. This was primarily because, as a major refiner, Amoco was subject to Department of Energy regulations that limited the price it could charge for liquid propane. (Exhibits 265-289, Appendix in Support of Amoco's Motion for Summary Judgment at A169-A183). The price limitations did not apply to non-refiners, and for that reason, the LPG operation would be more valuable and profitable if owned by a non-refiner. (Exhibit 834, Appendix in

Support of Amoco's Motion for Summary Judgment at A198). The approval of sale by Amoco's parent, Standard Oil Company (Indiana), was based upon these facts. (Exhibit 265, Appendix at A169; Exhibit 267, Appendix at A171).

The plaintiffs do not attempt to controvert these facts. Indeed, the plaintiffs have stipulated that Amoco sought to sell the LPG operation for business reasons. (Pretrial Order at 5). However, the plaintiffs contend that because Amoco received offers from other prospective purchasers which were <u>lower than the Norgas offer</u> but included an offer to credit years of service with Amoco for all purposes under the buyers' retirement plans, Amoco must have

accepted the Norgas offer "for the purpose of interfering" with the plaintiffs' attainment of future benefit rights in violation of Section 1140. Moreover, say the plaintiffs, since Norgas was a party to this "discrimination," Norgas is also liable.

The plaintiffs' theory distorts the plain meaning of Section 1140. Indeed, if the plaintiffs' theory were accepted, Section 1060(b) would be little more than a redundant appendage in the text of ERISA, since Section 1140 would generally have the effect of requiring employers to sell their businesses on terms that protect employees' inchoate interests in non-vested benefits under the seller's plan. Neither the express

language of Section 1140 nor its legislative history reveals any such Congressional intent.[34] The plain fact is that neither ERISA in general nor Section 1140 in particular was intended to outlaw the termination of contingent future liabilities such as those involved here pursuant to the sale of the entire division or operation of the employer's business. See Aronson, 730 F.2d at 16. Cf. Sutton v. Weirton Steel Division, 567 F. Supp. 1134, 1198 (N.D. W.Va. 1983) (even assuming that avoiding future pension obligations was the employer's sole motivation for selling a division of its operations in a manner which adversely affected contingent employee benefits, the sale did not violate

ERISA); <u>Sutton v. Weirton Steel Division</u>, 724 F.2d 406, 410 (4th Cir. 1983), <u>cert. denied</u> ____ U.S. ____, 104 S.Ct. 2387 (1984) (making same assumption in affirming summary judgment). Moreover, the fact that the LPG employees were terminated when the LPG operation was sold, whereas employees in other Amoco divisions or operations which were not sold were retained and continued as participants in the Amoco plan, simply does not establish the kind of discrimination prohibited by Section 1140. <u>Aronson</u>, 730 F.2d at 16. The termination of plaintiffs' employment with Amoco was merely an incidental result of an entirely legitimate business transaction

which ERISA was not designed to regulate or prohibit.

Because there is no evidence on the record of any discrimination or adverse treatment within the prohibitions of Section 1140, the defendants are entitled to judgment as a matter of law with respect to these claims.[35]

F. The Claims Under 29 U.S.C. § 1141

Proceeding directly in the face of all existing precedent as well as the plain language of the statute itself, plaintiffs next claim a right to recover under 29 U.S.C. § 1141, which provides, inter alia:

> It shall be unlawful for any person through the use of fraud, force, violence, or threat of the use of

force or violence, to restrain, coerce, intimidate or attempt to restrain, coerce or intimidate any participant or beneficiary for the purpose of interfering with or preventing the exercise of any right to which he is or may become entitled under the plan [or] this title. . . Any person who willfully violates this section shall be fined $10,000 or imprisoned for not more than one year, or both.

Id. This section of ERISA is clearly a criminal statute designed to supplement 1140 by giving law enforcement officials the right to prosecute individuals who fraudulently or coercively interfere with an employee's rights under a pension plan.

As every court which has addressed the question has concluded, Section 1141 provides no private right of action whatsoever, but simply allows for criminal prosecution of certain egregious forms of conduct already prohibited by Section 1140. See, e.g., West v. Butler, 621 F.2d 240, 243-44 (6th Cir. 1980); Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds, 559 F. Supp. 158 (N.D. Ill. 1982). Thus, plaintiffs' Section 1141 claim is devoid of legal merit and is due to be dismissed. Enforcement of Section 1141 is the exclusive prerogative of the Attorney General. See, West v. Butler, 621 F.2d at 244.

G. The Claims Under 29 U.S.C. 1022

Section 1022 of ERISA requires that a "summary plan description" be filed with the Secretary of Labor. 29 U.S.C. 1022(a). The plan description and summary plan description are required to contain, among other things,

> The name and type of administration of the plan;. . . the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; [and] the circumstances which may result in disqualification, ineligibility or denial or loss of benefits.

29 U.S.C. § 1022(b). Plaintiffs contend that by failing to disclose in the plan

the description the circumstances which might result in their loss of employment of the possibility that the LPG operation might be sold, Amoco violated the duty imposed by Section 1022 to disclose "the circumstances which may result in disqualification, ineligibility, or denial or loss of benefits."

The plaintiffs have no viable claim under Section 1022. That section requires only a description of the plan itself, and what general circumstances would cause a loss of eligibility for benefits under the terms of the plan. See generally 29 C.F.R. § 2530.102-3(j)-(1) (Department of Labor regulations implementing § 1022). The summary plan description provided by

Amoco more than adequately satisfied those requirements. It repeatedly refers to the fact that eligibility for benefits will be lost if employment is terminated, and describes the various rights the employee will have under the different benefit plans if that occurs. Thus, the description of the "Retirement Plan" states that "all regular, full-time employees of the company are covered." (Exhibit 1 at 30, Appendix in Support of Amoco's Motion for Summary Judgment at A162). If further states that

> In order to enjoy the full benefits of this plan, you must "retire" from the company. You are retired or not retired depending on your status when you leave the company. You are

"retired" if you leave the company --

-- at age 65; or

-- at any time beginning at age 55; when your age plus years of service add up to 75; or

-- at any time for approved disability or with company consent by meeting certain plan requirements.

(Id). Immediately following the foregoing, it states in bold-face type that:

> If you have not satisfied any one of these requirements when you leave the company, you will be a "terminated employee" and not

entitled to full benefits of the plan.

(*Id*). The description goes on to state that "[i]f you leave the company before you have satisfied the requirements for retirement, you will be entitled only to the benefits of a terminated employee -- with these benefits based on your years of company service." (Exhibit 1 at 33, Appendix at A163). It then describes in detail the retirement benefits to which a terminated employee is entitled. (Exhibit 1 at 33-34, Appendix at A163-A164).

In view of the foregoing, there clearly was no breach by Amoco of its duty under § 1022 to describe "circumstances which may result in

disqualification, ineligibility, or denial or loss of benefits." The summary plan description clearly indicates the possibility that employment could be terminated, and that termination prior to the satisfaction of specific requirements would result in the loss of eligibility or denial of benefits in specific respects. Section 1022 imposes no duty for a summary plan description -- which, again, is designed to summarize the terms of the plan -- to go further and enumerate all imaginable future external events which could cause the termination of employment, be it the employee's poor job performance of insubordination, the company's poor economic condition caused by increased competition or a declining

demand for the company's product, a decision to abolish a particular job, or, as here, a decision to sell the business to another company.

There being no genuine dispute of material fact as to the 1022 claims, the Court concludes that defendants Amoco and Bearden are entitled to judgment as a matter of law.[36]

H. The Claims Under 29 U.S.C. 1024

Finally, the plaintiffs claim that Amoco's decision to sell the LPG facilities was a plan "modification or change which Amoco should have reported to the Secretary under the requirements of [29 U.S.C.] § 1024." (Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment at 36). Again, this

claim is utterly specious. The undisputed evidence establishes that LPG sale did not involve any change, amendment or modification of the terms of any of Amoco's benefit plans. Rather, plaintiffs' employment with Amoco was simply terminated at the time of the sale. Plaintiffs received all benefits to which they were entitled at the time under the terms of the existing plan, and non-terminated employees had the same rights under the plan as before the sale. In short, the sale effected no modification in the terms of the Amoco plan or the conditions for eligibility under the plan; it simply effected a termination of the employment of the plaintiffs and other LPG employees.[37]

Consequently, Amoco was not obligated to report the sale as a modification in the terms of the plan under Section 1024.[38]

For these reasons, defendant Amoco is entitled to judgment as a matter of law with respect to the claims made under 29 U.S.C. § 1024.[39]

CONCLUSION

Based on the foregoing analysis, the Court concludes that as to each and every one of the plaintiffs' claims, there exists no genuine issue of material fact, and that defendants are entitled to judgment as a matter of law. The plaintiffs' attempts to convert a routine business transaction into a series of state and federal wrongs are based upon severely strained

interpretations of law to which this Court cannot accede. An appropriate order will be entered.

DONE this 18th day of June, 1985.

FOOTNOTES

1. The defendants have also asserted diversity jurisdiction under 28 U.S.C. § 1332, and the doctrine of fraudulent joinder jurisdiction.

2. Joe D. Bearden, a resident of Alabama and a former employee of Amoco, is also named as a defendant in this action. Bearden has joined in Amoco's motion for summary judgment. The plaintiffs have not attempted to distinguish between Amoco and Bearden for purposes of this motion, nor will the Court do so.

3. This action was originally brought by the named plaintiffs as a class action. However, to date, no class has been certified. At the request of counsel, and with their mutual assent, the Court has proceeded to address the summary judgment motions at this time.

4. None of plaintiffs' claims are made against Norgas alone.

5. See Pretrial Order at 6,8.

6. See Affidavit of Larry J. Boyd.

7. This was one of two alternative bases for the Supreme Court's affirmance, the other being that no lifetime contract existed in any event. See Bates, 418 So. 2d at 906.

8. Plaintiffs have alleged that Amoco did in fact transfer some

managerial employees formerly employed in the LPG operation to other Amoco divisions and operations in Alabama. This is of little relevance to the legal issue at hand. For our purposes, Amoco was under no contractual duty to transfer particular employees to new positions unrelated to the work for which they were initially hired. See Alabama Mills; Bates. However, nothing in Alabama Mills or its progeny prohibits an employer from voluntarily transferring and retaining employees where it is feasible to do so.

9. The rule of Alabama Mills should not be confused with the defense of "impossibility of performance." As noted in City of Albertville v. United States Fidelity & Guaranty Co., 272 F.2d 594

(5th Cir. 1959), Alabama law has traditionally refused to recognize the "impossibility of performance" as a defense to a contract action, subject to certain limited exceptions. See also Mayo v. Andress, 373 So. 2d 620 (Ala. 1979); Capital Fertilizer Co. v. Ashcraft-Wilkinson Co., 202 Ala. 92, 79 So. 484, 487 (1918). In the case at hand, however, Amoco does not rely on an "impossibility of performance" defense. Rather, Amoco relies on the fact that the contracts, if they exist at all, terminated by virtue of their own terms (albeit terms implied by law) when the LPG operation was sold.

10. In addition to this claim for fraud against Amoco as an entity,

plaintiffs have also claimed that "[t]he defendant Amoco Oil Company by and through its agents, servants, and employees and executives conspired to defraud the plaintiffs" with respect to the security of their jobs and benefits. (Pretrial Order at 12). This allegation fails as a matter of law. Under the law of conspiracy in general, the law of Alabama in particular, a civil conspiracy to commit a tort requires a combination of two or more persons and cannot exist between a corporation and its agents or employees, since the acts of agents and employees acting within the line and scope of their employment are considered the acts of the corporation itself. See Nelson Radio & Supply Co. v. Motorola,

Inc., 200 F.2d 911, 914 (5th Cir. 1952), _cert. denied_ 345 U.S. 925 (1952); _Tuskegee Institute v. May Refrigeration Co., Inc._, 57 Ala. App. 344, 328 So. 2d 598 (1976), _affirmed in part, reversed in part on other grounds_ 344 So. 2d 156 (Ala. 1977). _Accord, Girard v. 94th St. & Fifth Ave. Corp._, 530 F.2d 66 (2d Cir. 1976), _cert. denied_ 425 U.S. 974 (1976); _Pearson v. Youngstown Sheet & Tube Co._, 332 F.2d 439 (7th Cir. 1964), _cert. denied_ 379 U.S. 914 (1964); _Zelmger v. Uvalde Rock Asphalt Co._, 316 F.2d 47 (10th Cir. 1963); _Jewel Foliage Co. v. Univlora Overseas Florida, Inc._, 497 F. Supp. 513 (M.D. Fla. 1980). This is only logical, since a corporation is a fictional entity and capable of acting

only through its agents and employees. Thus, insofar as the plaintiffs seek recovery for a conspiracy between Amoco and its agents and employees, the claim is legally precluded, and Amoco is entitled to judgment as a matter of law.

11. Misrepresentations as to future acts and events are actionable under Alabama law in certain circumstances. See Walter v. Woodall, 288 Ala. 510, 262 So. 2d 756 (1972); Ellis v. Zuck, 409 F. Supp. 1151, 1158 (N.D. Ala. 1976), affirmed 546 F.2d 643 (5th Cir. 1977).

12. On August 21, 1979, Amoco and Norgas held a meeting with Amoco LPG employees in Boaz, Alabama, to discuss the terms of the Amoco-Norgas sale contract and its effect on their jobs and

benefits. It is entirely undisputed that no later than August 21, 1979, every plaintiff had actual as well as constructive knowledge of the fact that Amoco's LPG operations were being sold, that plaintiffs were being terminated by Amoco, and that each of the plaintiffs would become an employee of Norgas and be covered by Norgas benefit plans when the sale was completed. (See Deposition of Davis at 31-33; Deposition of Fennell at 15, 35, 37-38, 43; Deposition of Gardner at 22-23; Deposition of Gurley at 26, 29-30; Deposition of Jones at 37-39; Deposition of Lovell at 35-38; Deposition of McClendon at 38-40, 51; Deposition of Moore at 34, 38-39; Deposition of Murphree at 35-36; Deposition of Owens at

39-40; Deposition of Phillips at 69-70, 73-74, 77-78; Deposition of Pinyan at 51-54; Deposition of Shaneyfelt at 24-46; Deposition of Shrader at 42-43, 48; Deposition of Sims at 27-28; Deposition of Weaver at 30-33.

13. Plaintiffs' knowledge of the sale by August 21, 1979, not only constituted actual knowledge of the fact that Amoco did not then intend to perform as represented, but it also put plaintiffs on inquiry notice of the possibility that Amoco's representations concerning the plaintiffs' job security were made with a contemporaneous intention to deceive and not to perform as promised. See Moore v. Merchants & Planters Bank, 434 So. 2d at 754 (fact

constituting the fraud deemed discovered at the time of discovery of facts which would provoke inquiry by a person of ordinary prudence and which, if followed up, would have led to the discovery of fraud). _Cf._ _McGriff_, 398 So. 2d 252 (fraud with respect to future acts or events deemed discovered when plaintiff first learns that defendant does not intend to perform as represented). _Compare_ _Walter v. Woodall_, 288 Ala. 510, 262 So. 2d 756 (1972) (fraud with respect to future actions or events requires contemporaneous intent to deceive or not to perform as promised).

14. The plaintiffs' breach of contract claims are separate and distinct and have been dealt with _supra_.

15. At oral argument on these motions, counsel for plaintiffs argued that the deprivation of an opportunity to take concerted job action or participate in negotiations concerning the terms of the sale constituted damage suffered by the plaintiffs in reliance on Amoco's misrepresentations. (Transcript of February 25, 1985 Hearing at 22-23).

16. Even where the date of injury is relevant, it is well-established that a cause of action in tort accrues (and the limitations period begins to run) as soon as the plaintiff suffers any damage as a result of fraud, regardless of whether additional damages are incurred later which were not apparent at or fixed at the time of first legal injury. See,

e.g., *Home Ins. Co. v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So. 2d 468, 473 (1973). Since the plaintiffs have argued that the damage they suffered included the deprivation of an opportunity to take concerted job action, seek other employment, or participate in the negotiations concerning the sale, *see* n. 15, *supra*, and since that damage necessarily occurred prior to August 21, 1979, when plaintiffs learned of the Amoco-Norgas sale, it is plain that the statute of limitations precludes the fraud claims at issue here.

17. It appears that the plaintiffs' claims of fraud with respect to the crediting of service are actually based upon nondisclosure of information rather

than affirmative misrepresentation. (*See* Amended Complaint of June 25, 1982, at pgh. 56). Thus, several plaintiffs repeatedly testified that they were never told that Amoco service *would* be credited under the Norgas retirement plan. (Davis Deposition at 41; Fennell Deposition at 58-59; Gurley Deposition at 39-40; Jones Deposition at 65; McClendon Deposition at 51-53). Of course, four of the plaintiffs admitted that they were told the truth concerning credit for Amoco service under the Norgas plan -- *i.e.*, that such service would *not* be credited. (Gardner Deposition at 22; Lovell Deposition at 37-38; Shaneyfelt Deposition at 26; Weaver Deposition at 35).

18. Indeed, the plaintiffs themselves implicitly recognize that these fraud claims "relate to" an employee benefit plan, since the only compensatory damages specifically sought by the plaintiffs for these fraud claims are "compensatory damages in the form of loss of employee benefits, including but not limited to, the value of the following benefits: early retirement, retirement, life and health insurance, vacation, and savings plan benefits...." (Pretrial Order at 17).

19. The grant of certiorari in Russell is apparently limited to whether a fiduciary may be liable for "punitive damages or extracontractual compensatory

damages" under ERISA. 52 U.S.L.W. 3203 (October 2, 1984).

20. Defendants also contend that these claims are barred by the statute of limitations and that plaintiffs suffered no damage as a proximate result of their reliance on any misrepresentations concerning the terms of the sale. These contentions have substantial support in the record. However, because the Court finds these fraud claims preempted, there is no need to reach these other contentions made by the defendants. The Court does note, however, that the record is entirely devoid of any evidence of any agreement or conspiracy between Amoco and Norgas to commit a civil wrong. In the absence of such evidence, the conspiracy

to defraud claim fails as a matter of law. See Purcell Co., Inc. v. Spriggs Enterprises, Inc., 431 So. 2d 515 (Ala. 1983) (negotiation of business sale alone is insufficient to establish that parties agreed or conspired to perpetrate a tort). The Court specifically notes this as an alternative basis for the dismissal of the fraud claims predicated upon conspiracy.

21. As noted above, ERISA does not require a retirement plan to provide for such immediate payments of vested benefits. See, e.g., Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust, 662 F.2d 617, 619-20 (9th Cir. 1981). Under the terms of the Standard Plan, however, a vested

participant whose employment terminates before he is eligible for retirement may elect to receive at that time an annuity equivalent to the present actuarial value of the vested benefits. (See Webb Affidavit, Ex. A. at 9.05(c)). In this case, each of the vested plaintiff elected to receive an annuity immediately under this provision of the Standard Plan, and is currently receiving those payments. (See Pretrial Order at 9).

22. In addition to the substantive ERISA violations enumerated above, plaintiffs have alleged a separate claim for a general conspiracy to violate ERISA. (Pretrial Order at 13). It would appear that this general "conspiracy to violate ERISA" claim fails to state a claim under

ERISA, the provisions of which focus on the underlying wrong rather than any conspiracy to commit the wrong. In any event, considering all evidence and inferences reasonably drawn therefrom, the Court finds no evidence in this record tending to establish that Amoco and Norgas agreed to violate ERISA. See and compare note 19, supra. Moreover, since the Court finds no substantive violations of ERISA on the facts of this case, the general "conspiracy to violate ERISA" claim must likewise fail.

23. As set forth in the Amoco-Norgas sale agreement, service with Amoco is credited for purposes of vesting under the Norgas retirement plan. (Pretrial Order at 7). Amoco service is

credited under the other Norgas plans, as well. (Ex. A to Aff. of John Churchhill). Although their damage allegations are somewhat ambiguous on this point (Pretrial Order at 17-18), plaintiffs have not adduced evidence of any loss caused by the alleged ERISA violations apart from the failure to credit Amoco service in calculating Norgas retirement benefits.

24. A contrary construction would not only flout 1060(b) (1)'s express language and the legislative history, but would also contravene the rule that, under ERISA, "[n]either Congress nor the Courts are involved in either the decision to establish a plan or in the decision concerning which benefits a plan

should provide." Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454 (6th Cir. 1984), cert. denied ____ U.S. ____, 105 S. Ct. 786 (1985).

25. Plaintiffs do not (and cannot) contend that the termination of all employees of a particular business or division in connection with the sale of that operation would constitute a per se violation of any provision of ERISA. Cf. Sutton v. Weirton Steel, 567 F. Supp. 1184 (N.D. W.Va. 1983), affirmed 724 F.2d 406 (4th Cir. 1983), cert. denied ___ U.S. ______, 104 S. Ct. 2387 (1984).

26. If and when the Secretary of Treasury does promulgate regulations imposing a crediting requirement, the validity of those regulations will of

course be determined under settled principles of administrative law. <u>Cf. Rowan Companies Inc. v. United States</u>, 452 U.S. 247, 253 (1981) (court's inquiry generally limited to whether the regulation is within the delegation of authority).

27. For present purposes, the Court has assumed without deciding that this is the type of "predecessor employer" situation that would fall within the ambit of § 1060(b).

28. In analagous situations where a federal statute delegates authority to promulgate regulations to an administrative agency and does no more than adopt these regulations by advance reference, the federal courts have

consistently held that where the administrative agency fails or chooses not to promulgate the described regulations, there is no substantive law for the court to apply and the court therefore lacks jurisdiction to entertain a claim alleging a violation of the Act. _See_, _e.g._ _Plan for Arcadia, Inc. v. Anita Associates_, 501 F.2d 390, 392 (9th Cir. _____, _cert. denied_ 419 U.S. 1034 (1974); _Wuillamy v. Werblin_, 364 F. Supp. 237, 240 n.2 (D. N.J. 1973). _Cf_. _Sierra Club v. Indiana-Kentucky Electric Corp._, 716 F.2d at 1154; _Citizens for Clean Air, Inc. v. Corps of Engineers, U.S. Army_, 356 F. Supp. at 18.

29. In any event, the plaintiffs have not stated a proper claim against

Norgas under § 1056. Norgas clearly was not the employer, administrator or fiduciary responsible for complying with the requirements of § 1056 vis-a-vis the Amoco plan, and no evidence has been adduced to demonstrate that Norgas promoted or participated in any such violation by Amoco within the meaning of Donovan v. Daugherty, 550 F. Supp. 390, 411 (S.D. Ala. 1982).

29.5 See Plaintiffs' Brief in Opposition to Defendants' Motions for Summary Judgment at 41.

30. For present purposes, it is not necessary for this Court to adopt the theory of Donovan nor express a view as to its scope or validity.

31. Clearly, if Amoco breached no fiduciary duties in negotiating the sale of the LPG facilities, then Norgas, which was not a fiduciary with respect to the Amoco plan, cannot be held liable for promoting or participating in any such breach. Compare Donovan v. Daugherty, 550 F. Supp 390, 411 (S.D. Ala. 1982). In any event, the Court is of the opinion that the mere purchase of a going business from a fiduciary, without more, would not render a nonfiduciary liable under § 1104 for the seller's breaches of fiduciary duty in connection with the sale, at least where no transfer of plan assets is involved.

32. Plaintiffs admit that Norgas was not a fiduciary with respect to the

Amoco plan and that § 1106 is by its literal terms technically inapplicable to Norgas. _See_ Brief of Plaintiffs in Opposition to Defendants' Motions for Summary Judgment at 41. However, plaintiffs contend that Norgas is liable for Amoco's violation of § 1106 because Norgas "participated" in the violation by Amoco. _Cf. Donovan v. Daugherty_, 550 F.Supp. 390 (S.D. Ala. 1982)(third party who assists fiduciary in the breach of a fiduciary duty is liable for losses sustained by beneficiaries due to the breach). As to this contention, _see_ notes 30 and 31, _supra_.

33. Amoco's parent, Standard Oil Company, is the administrator and named fiduciary of the "Amoco" plan. (_See_

Pretrial Order at 9, pgh. 21). However, at least for purposes of the present motion, Amoco has not denied that it is a fiduciary with respect to the plan. _See generally_ 29 U.S.C. § 1002(21).

34. As far as Norgas is concerned, the failure to credit prior years of service with Amoco in calculating accrued benefits under the Norgas plan certainly cannot be considered discriminatory, particularly since neither ERISA nor the Norgas retirement plan requires such treatment. In fact, the granting of such credit would arguably constitute favorable discrimination with regard to plaintiffs and a breach of fiduciary duty as to the Norgas plan and its incumbent participants. _Cf._ _Winpinsinger v. Aurora_

Corp. of Illinois, Precision Castings Division, 456 F.Supp. 559, 566, 569 (N.D. Ohio 1978)(requirement that fiduciary discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries prohibits fiduciary from granting preference as between plan's participants or as between plan's beneficiaries).

35. Plaintiffs argue that questions of intent or motive are rarely appropriate for summary judgment, citing Sahadi v. Continental Illinois National Bank and Trust Co., 706 F.2d 193 (7th Cir. 1983). While this proposition is not without support, it has little application where, as here, the underlying facts are not disputed and the

central question to be determined is whether, as a matter of law, the discrimination alleged is the kind of "discrimination" that falls within the proscription of a statute narrowly tailored to serve specific purposes. In any event, to the extent that the court must draw inferences from the undisputed evidentiary facts to determine whether there has been prohibited discrimination, the court in a nonjury case is entitled to draw such inferences and conclusions on motion for summary judgment if a bench trial would not enhance its ability to draw those inferences and conclusions. See Coats & Clark, Inc. v. Gay, 755 F.2d 1506, 1509-10 (11th Cir. 1985); Nunez v. Superior Oil Co., 572 F.2d 1119, 1123-24

(5th Cir. 1978). The ERISA claims made by the plaintiffs in this case are not triable to a jury, _see_ _Calamia v. Spivey_, 632 F.2d 1235 (5th Cir. 1980), and it does not appear that any further probative evidence on point would likely be presented at trial. Based on _all_ of the evidence before the Court at this time, then, the Court finds that the plaintiffs have not suffered discrimination or other adverse treatment within the prohibitions of Section 1140.

36. No claim has been made under Section 1022 against Norgas, which obviously had no duty of reporting or disclosure with respect to the Amoco plan.

37. Even where the terms of a proposed sale of a business do involve amendments of existing plans, neither Section 1022 nor Section 1024 requires an employer to supply information regarding amendments before the amendments are effected. Sutton v. Weirton Steel Division, 567 F.Supp. 1184, 1196 (N.D. W. Va. 1983), affirmed 724 F.2d 406 (4th Cir. 1983), cert. denied ____ U.S. _____, 104 S.Ct. 2387 (1984).

38. In any event, the Court is of the opinion that Section 1024 provides no private cause of action for failure to report modifications to the Secretary (as opposed to the failure to comply with the duties of reporting and disclosure owed to participants and beneficiaries).

Therefore, even assuming that the sale did constitute a "modification" of the plan within the meaning of Section 1024, the plaintiffs would have no right to recover the damages they seek based upon Amoco's failure to properly report the modification to the Secretary.

39. Plaintiffs have made no claim against Norgas under Section 1024.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-7623

WILLIE D. PHILLIPS, et al.,

Plaintiffs-
Appellants,

versus

AMOCO OIL COMPANY, etc., et al.,

Defendants-
Appellees

Appeal from the United States
District Court for the
Northern District of Alabama

ON PETITIONS(S) FOR REHEARING
(October 28, 1986)

BEFORE: RONEY and CLARK, Circuit Judges, and DOYLE*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellants is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

* Honorable James E. Doyle, Senior U.S. District Judge for the Western District of Wisconsin, sitting by designation.

799 F.2d 1464

WILLIE D. PHILLIPS, et al.,

Plaintiffs-Appellants,

v

AMOCO OIL COMPANY, et al.,

Defendants-Appellees.

No. 85-7623

United States Court of Appeals,

Eleventh Circuit

September 22, 1986

Before RONEY, Chief Judge, CLARK, Circuit Judge, and DOYLE, Senior District Judge.

CLARK, Circuit Judge:

Former employees of Amoco Oil Company's Alabama retail liquid propane

gas ("LPG") business appeal from the district court's decision to grant summary judgment in favor of Amoco Oil Company ("Amoco"), Joe D. Bearden, and Norgas Propane Gas Company ("Norgas") on claims of breach of contract, state common-law fraud and Employee Retirement Income Security Act ("ERISA") violations arising in the context of the sale of Amoco's Alabama LPG operations to Norgas. We affirm.

I. FACTS

Appellants (the "employees") were formerly employed by Amoco in its LPG operations in Alabama. All participated in the Employee Retirement Plan of

Standard Oil Company and Participating Companies (the "Standard Plan").

In May of 1979, Amoco agreed to sell its LPG operations in the southeastern United States to Norgas. The sales contract was signed on July 31, 1979 and the sale closed on September 4, 1979. Upon selling its Alabama LPG operations, Amoco completely left the retail LPG business in Alabama and therefore had no work in that area for any of the employees.

The sales contract provided that Norgas would offer employment to each regular full-time employee at his or her current salary. It further provided that retirement benefits under Norgas' retirement plan would be based on years

of service with Norgas, except that continuous years of service with Amoco would be credited by Norgas for vesting purposes. Thus years of service with Amoco would not be credited for the purpose of calculating benefits or determining eligibility for early retirement. Each of the employees with vested benefits under the Standard Plan, including those who have not yet reached the age of sixty-five, opted to receive and is currently receiving an annuity from the Standard Plan.

A meeting for the Amoco employees was held on August 21, 1979 at Boaz, Alabama to explain the various Norgas benefits that would be available to the employees after the sale (the "Boaz

meeting"). At the meeting, the employees were informed of the sale of Amoco's LPG operations to Norgas. They were also told that:

> On every other plan we recognize your service with Amoco. For the Retirement Plan, you must treat the day you begin work with Northern Propane Gas Company as your first day of service.

While the parties dispute whether all the employees understood that their years of service would not be credited by Norgas for all purposes, there is no dispute that they were told at the Boaz meeting that Norgas would not credit years of service with Amoco under its retirement

plan. There is also no dispute that in August, 1979, the employees were given copies of a Norgas summary plan description stating that the retirement benefits they would receive would depend on service and pay with Norgas. The employees began employment with Norgas on September 4, 1979, the closing date of the sale to Norgas.

On September 4, 1980, the employees filed suit against Amoco, Bearden and Norgas in an Alabama state court. The case was eventually removed to federal district court. After eight amendments, the employees' complaint finally contained state breach of contract claims, state fraud and conspiracy to

defraud claims, and various ERISA claims against Amoco and Norgas.

Norgas and Amoco filed separate motions for summary judgment. On February 25, 1985, the district court heard oral argument on the motions and, at the close of argument, orally ruled that it was granting Norgas' motion and taking Amoco's motion under advisement. On June 18, 1985, 614 F. Supp. 1094, the district court issued its memorandum opinion granting all motions for summary judgment in favor of Amoco and Norgas.[1]

On June 28, 1985, the employees filed a motion to reconsider or vacate the judgment and for recusal of District Judge Seybourn H. Lynne under 28 U.S.C. 455(a). The employees claimed that an

appearance of impropriety arose when the law clerk who had drafted Judge Lynne's memorandum opinion accepted employment with the firm representing Norgas in this litigation prior to drafting the opinion. There is no dispute that the employees' attorneys were informed of the fact that Judge Lynne's sole law clerk had accepted employment with the law firm representing Norgas in January of 1985, seven months before they requested recusal. Judge Lynne denied the recusal motion on the ground it was not timely and that the employees had not been denied due process of law. The employees appeal from the summary judgments in favor of Amoco and Norgas and from the denial of their recusal motion.

II. ISSUES

The employees make the following arguments with respect to their state law claims on appeal: (1) that Amoco breached lifetime employment contracts with its employees when it sold its Alabama LPG operations to Norgas; (2) that their claim that Amoco fraudulently assured them of lifetime employment with Amoco even while negotiating the sale of the business is not barred by an Alabama statute of limitations; (3) that their claim that Amoco and Norgas fraudulently concealed the effect of the sale on credit for years of service toward retirement benefits is not preempted by

ERISA. The employees also argue that Amoco and Norgas bargained away credit for years of service with Amoco when they negotiated the sales contract, thereby violating the following provisions of ERISA: (1) the provision that years of service with predecessor employer be credited by successor employer (29 U.S.C. § 1060(b)(2); (2) the provision setting forth a fiduciary duty to act solely for the benefit of plan beneficiaries (29 U.S.C. § 1104); (3) the anti-discrimination provision (29 U.S.C. § 1104); (4) the prohibited transactions provision (29 U.S.C. § 1106); (5) the provision governing early retirement benefits (29 U.S.C. § 1056); (6) the criminal fraud provision (29 U.S.C. §

1141); and (7) the disclosure provisions (29 U.S.C. §§ 1022, 1024). Finally, the employees argue that Judge Lynne abused his discretion in failing to vacate summary judgment in favor of Norgas and to recuse himself in light of the relationship between his law clerk and Norgas' attorneys.

III. ANALYSIS

The district court's opinion in this case is comprehensive, thorough and well reasoned. Phillips v. Amoco Oil Co., 614 F.Supp. 694 (N.D.Ala.1985). Where, as here, a litigant adopts what might be called a "shot gun" approach and invokes ever possible cause of action, no matter

how tangentially related to the particular context of the case, a few claims are bound to be so obviously inappropriate that little discussion is warranted to dispose of them. The district court's opinion treats even these claims carefully and exhaustively. This court has benefitted from that effort.

Unfortunately, the employees have not narrowed their arguments for appeal as they might have. Rather than pointing out the error in the reasoning that led the district court to reject their positions, they have restated the arguments they made to the district court in the first place. Thus it happens that, with respect to many of the

arguments presented on appeal, we have little, if anything, to add by way of explanation of our decision that has not been stated by the district court. For that reason, although we have carefully and independently considered the employees' legal arguments, we will not duplicate the district court's efforts by explaining our decision with the same thoroughness and detail. We write briefly to address various arguments made on appeal and to make clear our understanding of the scope of the district court's reasoning.

A. State Law Claims

1. <u>Breach of Life-time Employment Contracts</u>

The employees argue that their life-time employment contracts with Amoco were breached when Amoco sold its business to Norgas. However, even where a life-time employment contract is legally enforceable, Alabama law provides that the contract remains in effect only as long as the employer remains in the business for which the employee was hired and needs the particular services the employee was hired to perform. <u>See, e.g.,Bates v. Jim Walter Resources, Inc.</u>, 418 So.2d 903, 906 (Ala.1982). It is undisputed that Amoco completely abandoned the retail LPG business in

Alabama when it sold its operations to Norgas. The employees present no argument on appeal that was not persuasively rejected by the district court. In fact, they conceded at oral argument that they have no breach of contract claim that is not identical, at bottom, to the fraud claim addressed in the next section. The district court correctly granted summary judgment in favor of Amoco on this claim.

2. Fraudulent Misrepresentation With Respect to Continued Employment with Amoco

The employees allege that Amoco continued to represent to them that they would be employed for life with Amoco's Alabama LPG operations even as Amoco negotiated the sale of the business to Norgas. They believe that Amoco fraudulently induced them to remain employed with Amoco in order to make the business a more attractive going-concern to Norgas. The district court granted summary judgment with respect to this claim on the ground it was barred by a one-year statute of limitations, holding that the employees' cause of action accrued when they learned that Amoco would sell the business and terminate their employment contracts in August, 1979.

The issue on appeal is whether the district court correctly determined that the employees' cause of action accrued, and the period of limitations began to run, when they learned that Amoco was to sell the business. There is no dispute that all the employees learned that the LPG operations would be sold no later than August 21, 1979. They did not file their suit until September 4, 1980. They insist that their cause of action did not accrue until their employment with Amoco was actually terminated on September 4, 1979, but have cited no case that supports this statement of law.

The employees' attorney insisted repeatedly at oral argument that the injury associated with this type of claim

occurs upon actual termination and that the cause of action does not therefore accrue until that point, relying on Brotherhood of Locomotive Firemen & Enginemen v. Hammett, 273 Ala. 397, 140 So.2d 832 (1962). That case, however, was not a fraud case but involved malicious interference with employment, a cause of action that obviously does not arise until the actual interference or termination occurs.

In contrast, the employees' cause of action sounds in fraud and their injury was by definition the detrimental reliance that occurred prior to their discovery that they had been victims of misrepresentation. According to Alabama law, a fraud case of action accrues, and

the one year statute of limitations begins to run, at the discovery of the facts constituting the fraud. Such discovery occurs when the plaintiff should have discovered facts that would provoke a person of ordinary prudence to inquiry. Colafrancesco v. Crown Pontiac-GMC, Inc., 485 So.2d 1131 (Ala.1986). In this case, discovery took place no later than August 21, 1979.

That the employment contracts did not actually terminate until September 4, 1979, makes no difference. The statute of limitations begins to run when the plaintiff knows or should know that the employer does not intend to perform as promised. Retail, Wholesale and Department Store Employees Union, Local

453 v. McGriff, 398 So.2d 249, 252 (Ala.1981). McGriff involved, as does the instant case, the claim that the employees was induced to work for the employer by a promise of pension benefits upon having remained on the payroll for a certain number of years. The Alabama Supreme Court held that the employee's fraud case of action arose when he knew or should have known that the employer did not intend to provide the promised benefits, not at the point he was actually denied the benefits. The district court correctly granted summary judgment in favor of Amoco on the ground that this particular fraud claim is barred by the statute of limitations.

3. Fraudulent Failure to Disclose Effect of Sale on Retirement Benefits

The employees claim that Amoco and Norgas deprived them of an opportunity to negotiate with Norgas to credit their years of service with Amoco for the purposes of calculating retirement benefits and induced them to remain employed with Amoco by failing to disclose the disadvantageous terms of the sale. The district court held that this state common law fraud claim was preempted by ERISA.

ERISA expressly provides that it "shall supersede any and all State laws insofar as they may now or hereafter

relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). The employees argue that ERISA does not preempt state common law fraud actions involving pension plans. Without expressing any opinion as to whether ERISA preempts other fraud claims arising under state common law, we hold that ERISA preempts Alabama's common law fraud cause of action insofar as it recognized the particular type of claim raised by the employees in this case.

The Supreme Court has addressed the scope of ERISA preemption in two cases. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 191 S.Ct. 1895, 68

L.Ed.2d 402 (1981). In neither case did the Supreme Court address the question whether ERISA preempts state common law causes of action. However, the opinions are helpful for their general discussions of the scope of ERISA preemption.

The Supreme Court in Shaw explained that Congress used the words "relate to" in their broad sense. Shaw 463 U.S. at 98, 103 S.Ct. at 2900. Thus, ERISA preemption is not limited to those state laws specifically designed to affect employee benefit plans. Nor does it preempt only state laws dealing with the particular subject matters covered by ERISA, such as reporting, disclosure and fiduciary responsibility. Id. Most importantly, for the purposes of this

case, 29 U.S.C. § 1144(c)(1) expressly explains that the term "state law" in the preemption provisions includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." It is clear, then, that ERISA preempts state common law causes of actions as they relate to employee benefit plans.[2]

We agree with the district court that the particular fraud claim raised by the employees in this case is preempted by ERISA. The action alleged by the employees to have been fraudulent was the failure to disclose the terms of the Norgas benefit plan. The claim depends on the existence of a duty to disclose, which necessarily depends on an

interpretation of the fiduciary duties imposed by ERISA. The claim also runs directly into ERISA's disclosure provisions. The compensatory damages specifically sought by the employees for the fraud claim are "compensatory damages in the form of loss of employee benefits, including but no limited to, the value of the following benefits: early retirement, retirement, life and health insurance, vacation, and saving plan benefits . . . ." Pretrial Order at 17. This request for damages demonstrates that the employees' fraud claim not only "relates to" an employee benefit plan but is at its core an ERISA claim.

The employees protest that to hold that ERISA preempts this fraud claim,

while also holding that ERISA does not prohibit the wrong the employees feel they have suffered, leaves a "gap" in the law. That is exactly the result that obtains when Congress determines that federal law should govern a broad area to the exclusion of state regulation and chooses not to prohibit actions formerly prohibited by state law. It is the very conflict between the federal scheme and state law that is to be avoided through preemption. To argue that Congress has created a "gap" in the law does not undermine the reasoning on which a finding of preemption is based. We turn now to the employees' ERISA Claims.

B. ERISA Claims

1. <u>Statutory Requirement that Years of Service With Predecessor Employer be Credited by Successor Employer</u>

29 U.S.C. § 1060(b) provides in relevant part:

(1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessors shall be treated as service for the employer, and

(2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer,

service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary of the Treasury, be treated as service for the employer.

There is no dispute that § 1060(b)(2) is the section applicable in this case; Norgas does not maintain the plan of Amoco but maintains its own retirement plan. Although the Secretary of the Treasury has promulgated no regulations requiring that a successor employer give credit for years of service with a predecessor employer, the employees contend that § 1060(b)(2) requires Norgas to credit their years of service with Amoco for the purposes of

calculating benefits and determining eligibility for early retirement.

The district court determined that the statutory language and legislative history of this section make clear that Congress intended to leave the question whether to require such credit to the Secretary of the Treasury and that no such credit would be required absent the promulgation of regulations to that effect. The employees make no effort to shed light on any particular error committed by the district court but simply reassert the argument that the phrase "to the extent provided in regulations prescribed by the Secretary of the Treasury" should be read out of the statute. This we cannot do.

We will not further belabor this dispute. As set forth in the district court's opinion, Phillips, 614 F.Supp. at 713-714, the legislative history of § 1060(b)(2), Department of Labor regulations defining "years of service" and the only case interpreting those regulations all lead to the conclusion that ERISA does not require a successor employer to credit years of service with the predecessor employer where the successor does not maintain the benefit plan of the predecessor. Remaining cautious about reading such a requirement into any provision of the statutory scheme in the face of Congressional intent to leave this question of policy to the Secretary of the Treasury, we

nonetheless go on to address the rest of the employees' ERISA Claims.

2. Fiduciary Duty

29 U.S.C. § 1104 provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." The employees argue that Amoco breached its fiduciary duty in negotiating a higher sale price for its LPG Operations by bargaining away credit for their years of service with Amoco. Norgas is argued to be liable, although not a fiduciary, for aiding a fiduciary to breach its duty under ERISA.

The district court held that the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of the sale will affect contingent and non-vested future retirement benefits. This holding is supported by the fact that ERISA simply does not prohibit a company from eliminating previously offered benefits that are neither vested nor accrued. Moreover, the ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets. See Sutton v. Weirton Steel

Division of National Steel Corp., 724 F.2d 406 (4th Cir.1983), cert. denied, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984), aff'g, Dhayer v. Weirton Steel Division of National Steel Corp., 571 F.Supp. 316 (N.D.W.Va.1083) and Sutton v. Weirton Steel Division of National Steel Corp., 567 F.Supp.1184(N.D.W.Va.1983). We emphasize that the only "interests" at stake in this case are contingent and non-vested future retirement benefits. There is no dispute that Amoco has fulfilled and continues to fulfill its obligations with respect to vested retirement benefits earned under the Standard Plan.

3. Discrimination

29 U.S.C. § 1140 provides:

"It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan[covered by ERISA] . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or ERISA]. . . ."

The employees argue that Amoco and Norgas unlawfully discriminated against them for the purpose of interfering with the attainment of rights to which they

may have become entitled under the Standard Plan.

As the district court held, this provision simply does not prohibit the sale of a going business. Furthermore, as we noted above, the employer may terminate previously offered contingent non-vested benefits. Finally, as the entire business was sold in this case, there could not have been any discrimination among employees.

4. Disclosure Requirements

29 U.S.C. § 1022(a) requires that a plan description containing the circumstances that may result in disqualification, ineligibility or denial

or loss of benefits be provided to plan participants. The employees contend that Amoco violated this section by failing to disclose in its plan description the possibility that sale of the business might result in the loss of future benefits. While the plan description does not refer specifically to sale of the business, it does notify employees that a "terminated employee" will not be entitled to full benefits. A terminated employee is defined therein as one who has not retired from the company. The employees were thereby notified that any event causing them to leave their employ with Amoco prior to retirement would result in receipt of less than full benefits. As the description of the

Standard Plan adequately notified employees that an event such as the sale of a business would result in termination, Amoco complied with the disclosure requirement.3

5. Miscellaneous Additional Claims

The employees raise several claims under provisions of ERISA that are patently inapplicable to the facts of this case.

By its terms, 29 U.S.C. § 1106, the "prohibited transactions" provision, applies only to transactions to which the plan itself is a party or in which the monies, property or fiscal assets of the plan are involved. Such is not the case

here. Section 1056 sets forth certain requirements that must be met should a plan provide for early retirement benefits, but it does not confer upon plan participants any substantive right to continued employment in order to qualify for early retirement benefits. Section 1141 is a criminal statute that provides no private right of action but allows only for criminal prosecution by the United States Attorney General. Finally, § 1024 requires the plan modification be reported to the Secretary of the Treasury and is inapplicable in this case because there was no modification of the Standard Pan.

C. Appearance of Impropriety

The district court's denial of the employees' motion to reconsider or vacate or for recusal is due to be affirmed for several reasons. First, the employees' attorneys knew about the law clerk's employment with the firm representing Norgas six to seven months before moving for recusal. Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning the court's ruling on the merits. United States v. Slay, 714 F.2d 1093, 1094 (11th Cir.1983), cert denied, 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984). The employees' argument that they were not aware of the facts

supporting recusal until they realized that the law clerk had drafted the memorandum opinion explaining summary judgment in favor of Norgas is disingenuous. They were well aware that the law clerk was actively involved with the case and that he, as Judge Lynne's only law clerk, could be the only person who would work with the judge to draft the opinion. Clearly the facts giving rise to any appearance of impropriety were known by the employees' attorneys long before the law clerk actually began drafting the opinion.

Several factors lessen any appearance of impropriety and ensure that the due process rights of the employees were not violated. The case had been

before the judge for many years and many clerks had worked on it. By the time the law clerk at issue was hired, the judge had formed the conclusion that the employees' claims were without merit. Furthermore, the court granted Norgas' motion for summary judgment at oral argument, before the law clerk began work on the opinion justifying the decision. Additionally, the claims against Norgas were meritless, if not frivolous. Finally, because this case was decided on summary judgment motions, the court was not called upon to resolve conflicts in evidence, weigh the credibility of witnesses or exercise judicial discretion. The district court's decision has been subjected to de novo review by this court.

Judge Lynne's decision not to vacate the judgment and not to recuse himself was well within his discretion.

For the forgoing reasons, the summary judgments in favor of Amoco, Bearden and Norgas are

AFFIRMED.

FOOTNOTES

1. Claims against Bearden are not discussed separately in the district court's memorandum opinion or in the parties' briefs to this court. As Bearden is an agent of Amoco, our discussion of the claims against Amoco applies to the claims alleged against Bearden. We will not further refer to Bearden in this opinion.

2. We emphasize that ERISA preempts such causes of action as only they relate to employee benefit plans. Our holding with respect to preemption is therefore limited by the facts of this case. Hence, while we note that other courts have held ERISA to preempt state common

law causes of action, we acknowledge that these opinions are useful only to the extent they support the general proposition that ERISA may preempt state law causes of action. See e.g., Authier v. Ginsberg, 757 F.2d 796, 799-802 (6th Cir. 208, 88 L.Ed.2d 177 (1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1356-57 (9th Cir. 1984), cert. denied, ____ U.S. _______, 106 S.Ct. 183, 88 L.Ed.2d 152 (1985); Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert.denied, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981). For additional cases see the district court's opinion, Phillips, 614 F.Supp. at 708.

3. Moreover, it is not clear that § 1022(a) requires that a plan description

disclose the circumstances under which inchoate, non-vested contingent interests in future benefits might be cut off.

29 U.S.C. 1140

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall

be unlawful for any person to discharge, find, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in an inquiry or proceeding relating to this chapter of the Welfare and Pension Plans Disclosure Act. the provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. 1144

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all

State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagrah (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(b) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purpose of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a

State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagrah (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section --

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it

provides for more than the effective administration of such Act as if effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section --

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to use arrangement to the extent that such law provides --

(I) standards, requiring the maintenance of specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements

only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) the term "State law" includes all laws, decisions, rules, regulations,

or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify,

invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any regulation issued under any such law.

6-2-3. Accrual of claim - Fraud.

In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have one year within which to prosecute his action.

6-2-39. Same -- One year.

(a) The following must be commenced within one year.

(1) Actions for malicious prosecution;

(2) Actions for seduction;

(3) Actions qui tam or for a penalty given by a statute to the party aggrieved, unless the statute imposing it prescribes a different limitation;

(4) Actions of libel or slander; and

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; and

(6) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws

respecting the payment of wages, overtime, damages, fee and penalties.

(7) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is ought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondeat superior.

(8) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent.

(b) If any action is commenced before the time limited has expired, judgment is entered for the plaintiff and such judgment is arrested or reversed on appeal, the plaintiff or his legal

representative may commence an action again within one year from the reversal or arrest of such judgment though the period limited may in the meantime have expired; and in like manner, if more than one judgment is arrested or reversed, an action may be recommenced within one year.